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No. 94 1313 FEB 1 1995

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In The

Supreme Court of the United States

October Term, 1994

GEORGE ZILICH,

Petitioner,

vs.

THOMAS J. LONGO, Individually and as Mayor of the CITY OF GARFIELD HEIGHTS, *et al.*,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a City Ordinance a Bill of Attainder proscribed by Article I, Section 10 of the United States Constitution where that Ordinance enacts into law the opinion of the City Council that a former councilman intentionally violated the City's Charter and authorizes the City's law director to take whatever action is necessary — legal or otherwise — to recoup the councilman's pay?

2. Does a City Ordinance enacted against a former councilman for speaking out on matters of public concern violate, under color of law, the councilman's right of freedom of speech protected by the First Amendment of the United States Constitution?

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

George Zilich

Respondents:

Thomas J. Longo, Individually and as Mayor of the City of Garfield Heights, Ohio; David E. Mack, Individually and as Law Director of the City of Garfield Heights, Ohio; Nancy J. Marincic, Councilwoman and individually, Rose Marie Lovano, Councilwoman and Individually; Joseph Suster, Councilman and Individually; Michael Abella, Council President and Individually; and Wilhelm G. Spiegelberg, Assistant Law Director and Individually.

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OPINIONS BELOW

The Judgment Entry and Memorandum Opinion of the United States District Court for the Northern District of Ohio, Eastern Division, denying Respondents' motions for summary judgment, is unreported (App. D, 18a-23a, App. E, 24a-48a). The decision of the United States Court of Appeals for the Sixth Circuit, overruling in part and affirming in part, is reported. *Zilich v. Longo,* 34 F.3d 359 (1994).

The Order denying the petitions of the Petitioner and the Respondents for rehearing *en banc* is unreported (App. B, 3a-4a).

STATEMENT OF JURISDICTION

Petitioner requests this Court review the September 1, 1994 decision of the United States Court of Appeals for the Sixth Circuit, overruling in part and affirming in part the judgment of the United States District Court for the Northern District of Ohio, Eastern Division.

On November 3, 1994 an Order of the United States Court of Appeals for the Sixth Circuit was entered denying the Petitioner's and Respondents' Petitions for Rehearing.

The United States Supreme Court's jurisdiction to review the September 1, 1994 judgment of the United States Court of Appeals for the Sixth Circuit is conferred pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS STATUTES AND ORDINANCES INVOLVED

Article I, Section 10 of the Constitution of the United States provides in pertinent part:

> No State shall . . . pass any Bill of Attainder
> . . . .

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

42 U.S.C. § 1983, Civil Action for Deprivation of Rights, provides in pertinent part:

> Every person who, under color of any statute, [or] ordinance . . . of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.
> . . . .

Garfield Heights Ordinance No. 112-1991 provides in pertinent part:

> AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE,

TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH DURING HIS PREVIOUS TWO YEAR TERM AS COUNCILMAN AT WHICH TIME HE WAS INTENTIONALLY VIOLATING SECTION 9 OF THE CHARTER OF THE CITY OF GARFIELD HEIGHTS.

The entire Ordinance and accompanying Resolution are reproduced in Appendices F at 49a-50a and G at 51a-58a.

Garfield Heights City Charter, Qualifications of members and Rules of council, Sections 9 and 11:

Reproduced in Appendix H at 59a-60a.

Ohio Revised Code §§ 731.44 and 731.45, Qualifications of Members, rules and expulsion of members:

Reproduced in Appendices I and J at 61a-62a.

STATEMENT OF THE CASE

A. Procedural History

Petitioner served as a councilman for the City of Garfield Heights from November of 1989 until November 10, 1991. During the two years of his service the Petitioner was personally threatened, his property vandalized and his family terrorized. This terror campaign was authorized by the City's Mayor, Law Director, Assistant Law Director and members of council to retaliate against the Petitioner for his speech on issues of public concern which opposed the administration's position. In 1991 Petitioner chose not to seek re-election due to the ongoing campaign against him.

On November 11, 1991 the newly elected council passed by a 4-3 vote Resolution 54-1991 and Ordinance 112-1991.[1] The Ordinance authorized the Law Director to take whatever action was necessary, *legal* or *otherwise,* to recoup the Petitioner's pay due to Petitioner's alleged intentional violation of Section 9 of the Charter of the City. The campaign to destroy Petitioner personally and politically carried the full force and effect of the law in the City of Garfield Heights. The threat to his person, property and possessions is now a matter of law.

On January 13, 1992 Petitioner filed suit against the City, the Mayor, the Law Director, an Assistant Law Director, and members of council in Cuyahoga County, Ohio alleging several causes of action including violations of the Petitioner's constitutional rights under color of law actionable under 42 U.S.C. § 1983. The Respondents removed the action to the United States District Court, Northern District of Ohio, Eastern Division, pursuant to the District Court's jurisdiction provided in 28 U.S.C. §§ 1331 and 1343. The Petitioner's Amended Complaint alleged due process, equal protection, First Amendment and Bill of Attainder constitutional claims as well as a state law defamation claim.

The Respondents filed three motions for summary judgment on the claims. The motions were denied by the District Court, David D. Dowd, Jr., J. on the Bill of Attainder, First Amendment, and defamation claims.[2] The Respondents were denied qualified immunity.

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1. The Resolution and Ordinance are reproduced in their entirety in Appendices F & G at 49a-58a.

2. The motions on Petitioner's equal protection and due process claims were granted.

The Respondents appealed the qualified immunity issue to the United States Court of Appeals for the Sixth Circuit. An interlocutory appeal on the issue of qualified immunity is authorized by *Mitchell v. Forsyth,* 472 U.S. 511, 105 S. Ct. 2806 (1985) and *Kennedy v. City of Cleveland,* 797 F.2d 297 (6th Cir. 1986). Jurisdiction of the Court of Appeals was invoked pursuant to 28 U.S.C. § 1291.

The United States Court of Appeals for the Sixth Circuit, Merritt, Chief Judge, held the District Court erred in holding that trial should proceed on the Petitioner's Bill of Attainder and First Amendment claims based upon the Ordinance and Resolution. The Court of Appeals affirmed the District Court's holding that trial should ensue on Petitioner's First Amendment claims based upon retaliation against the Petitioner by physical threats, vandalism and harassment. The Petitioner's and Respondents' request for rehearing and rehearing *en banc* were denied on November 3, 1994.

This Petition for Writ of Certiorari seeks review of the Court of Appeals decision holding the Ordinance was not a Bill of Attainder and was not a prohibited act of retaliation violating the Petitioner's First Amendment right to freedom of speech.

B. Statement of the Facts

The Petitioner, George Zilich, is a 35 year old man who was a life-long resident of the City of Garfield Heights. After marrying he resided outside the City from 1984 until June of 1986. Between June of 1986 and April of 1987 Zilich sought to purchase a home in Garfield Heights. He lived temporarily with his parents and then his in-laws. In April 1987 he and his wife purchased a home in Garfield Heights. At the time of his return to Garfield Heights, the residency requirement for a councilman contained in Section 9 of the City's Charter was one year. In November of 1987 that requirement was changed to three years.

In 1989 Zilich decided to seek election as a councilman. Before announcing his candidacy he retained legal counsel to research the three year residency requirement as it applied to him. He was informed by counsel that his residency for three years prior to the election would be established by the sale of his Solon home in June of 1986, his temporary residence with his parents in Garfield Heights in 1986, and his intent to reside permanently in Garfield Heights as demonstrated by his continuing search to purchase a home in the City. He was also counseled that since the change in the residency requirement occurred after he had purchased his Garfield Heights home in April of 1987 it could not be retroactively applied to him. Having concluded that he met the residency requirements he sought election.

On November 7, 1989 the Petitioner won election as a councilman receiving the largest number of votes of any council candidate. After the election a lawsuit was filed against him by the defeated incumbent on the basis that Zilich had not resided in the City for three continuous years before the election. On November 13, 1989 Zilich took the oath of office. On the same day a hearing was held on the lawsuit in the Cuyahoga County Court of Common Pleas. Although Zilich had not been served with a copy of the Complaint, he appeared with counsel and explained in detail the basis for his satisfaction of the residency requirements of Section 9 of the Garfield Heights Charter. David Mack, the City Law Director, attended and testified at the hearing and heard Zilich's testimony. The Cuyahoga County Court of Common Pleas dismissed the lawsuit on the basis the complaint, declaratory judgment request, and motion for injunction did not apply to challenge the qualifications of a councilman.

On November 13, 1989 Zilich and the other members of council passed a motion to approve and accept the qualifications of all of the elected members. The motion passed unanimously. Pursuant to Section 11 of the Garfield Heights Charter the council

determined the qualifications of its own members and accepted them. His qualification was not in dispute. On the same night, Mayor Longo told Zilich that unless he cooperated a lot of people would spend a lot of money to have him removed from office.

Thereafter, Zilich served on council. In February of 1990 he questioned some of the City's financial operations. He immediately received a threat against his safety from the City's Service Director. In March of 1990 Zilich opposed the Mayor's budget and council rejected it. Immediately after he received anonymous threatening phone calls which included threats of physical harm. Within weeks of the rejection of the Mayor's budget, complaints were raised at a council meeting questioning Zilich's residency. Council made no effort to expel Zilich as authorized under Section 11 of the Garfield Heights City Charter. However, David Mack, at the behest of Mayor Tom Longo, sought advice from the County Prosecutor's office regarding the residency requirement as it applied to Zilich. The County Prosecutor's response suggested to Mack that the circumstances surrounding Zilich's residency could lead Zilich to believe he was in full compliance with the requirement. The Prosecutor's letter and suggestion were forwarded to Mayor Longo. On several occasions thereafter, Mack and Longo expressed the opinion that the issue of Zilich's residency was legally dead.

In August of 1990 the threats against Zilich escalated when his home was vandalized. In November of 1990 the window of his car was shot out. In March of 1991 the tires on his car were slashed. The phone threats of physical harm continued. While Zilich was away on business trips his wife would receive threatening calls.

During the course of these events, Thomas Furth served as an Assistant Law Director for the City. In three extensive depositions, Furth testified to what he heard and saw while in his

position. His testimony included a detailed description of the Mayor's actions to destroy George Zilich both personally and politically.[3] The actions were carried out by threats, vandalism and use of force. Furth described statements made by Longo and Mack acknowledging that the threats and vandalism and efforts to destroy Zilich were being carried out. Furth described the Mayor discussing slapping Zilich around, hiring someone to break his legs, cutting him, tearing his throat out, terrorizing his family, sexually assaulting his wife, and otherwise destroying him permanently. He testified that Mayor Longo knew the residency issue was dead legally but that Longo ordered it to be used politically to destroy Zilich. Furth considered the actions so serious that he went to the FBI.

Because of the psychological and emotional impact of the effort of the Mayor and his cohorts to destroy him, Zilich decided not to run for re-election in 1991.

At an election night victory party in 1991 a discussion among the Respondents occurred where it was decided to present legislation which would put Zilich in a bad light, make him defend himself in the newspapers and otherwise punish him. On November 11, 1991 the newly elected council's first act was to pass Ordinance 112-1991 and Resolution 54-1991. The Ordinance and Resolution language was drafted by the City Law Department with suggestions from the Mayor, Law Director, Assistant Law Director, and members of council. Ordinance 112-1991 provided *inter alia:*

> AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO

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3. The testimony of Furth is cited extensively by Judge Dowd in an Appendix to his Memorandum Opinion and Judgment Entry. *See* App. D at 20a-23a.

> TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE, TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH DURING HIS PREVIOUS TWO YEAR TERM AS COUNCILMAN AT WHICH TIME HE WAS INTENTIONALLY VIOLATING SECTION 9 OF THE CHARTER OF THE CITY OF GARFIELD HEIGHTS.

Resolution 54-1991 provided *inter alia:*

> A RESOLUTION EXPRESSING THE DISAPPROVAL AND OUTRAGE OF THE COUNCIL OF THE CITY OF GARFIELD HEIGHTS IN REGARD TO THE INTENTIONAL DISREGARD OF SEC. 9 OF THE CHARTER OF THE CITY OF GARFIELD HEIGHTS BY FORMER COUNCILMAN GEORGE ZILICH DEMANDING THAT HE RETURN ALL COMPENSATION RECEIVED DURING HIS TENURE AS COUNCILMAN BECAUSE OF HIS INTENTIONAL VIOLATION OF THE CHARTER PROVISIONS OF THIS CITY.

The entire text of the Ordinance and Resolution are provided in Appendices F & G, at 49a-58a.

The Ordinance and Resolution were passed by council, approved by the Mayor and signed by the President of council. It became the law of the City of Garfield Heights that Zilich had intentionally violated the City's Charter and the Law Director

was to take whatever action was necessary — legal or otherwise — to recover Zilich's pay. No hearing nor notice was provided. The provisions of Section 11 of the Charter requiring notice, hearing and two-thirds (2/3) vote of council to expel any member were ignored.

The Ordinance and Resolution were passed despite the knowledge of each of the Respondents that Zilich had been threatened and his house vandalized. They were passed despite the fact that each of the Respondents had seen and read the transcript of the Common Pleas hearing protesting Zilich's election wherein Zilich explained his efforts in detail to assure he had met the requirements of Section 9. The Ordinance and Resolution were passed despite the knowledge of the Mayor and Law Director that the residency issue was legally a dead issue. They were passed despite their knowledge that the Prosecutors' office had informed them that Zilich had believed that he fully complied with the residency requirements.

Without benefit of judicial trial, the Ordinance found Zilich guilty of violating the Garfield Heights Charter, stigmatized his reputation, subjected his property to pursuit by the Law Director, and forfeited rights appurtenant to his position as a former councilman.

Zilich filed suit. In answer, the City filed a counterclaim against Zilich for his back pay. Pursuant to Garfield Heights Ordinance 103-1991, a former councilman is entitled to a defense against any lawsuits arising out of his service in office. Zilich requested a defense from the City and its liability insurer. The defense was denied by the insurer, in part, because ". . . George Zilich . . . was not a lawfully elected official . . . ." (*See* App. L at 68a-69a).

The Mayor, Law Director, Assistant Law Director and

council accomplished what they had set out to do, *i.e.*, punish Zilich for speaking out in opposition to their positions, embarrass him, defame him, and permanently drive him out of politics.

C. Judicial Decisions

Before the District Court for consideration were three (3) motions for summary judgment filed by the Respondents. The motions concerned (1) the Petitioner's federal claims, *i.e.*, equal protection, procedural and substantive due process, Bill of Attainder and First Amendment violations; (2) The Petitioner's state law defamation claim and (3) the Respondents' qualified immunity defense. The court granted the motions as to the equal protection and procedural and substantive due process claims but denied the motions regarding the remaining claims.

Regarding the Bill of Attainder the court held:

> The Resolution and Ordinance in question represents a classic case of Bill of Attainder. . . . The Ordinance passed by the Garfield Heights City Council does not apply to all citizens equally, but rather is directed at and applies to one individual, namely the plaintiff. . . .
>
> From the very language of the Resolution the inference can be drawn that the legislation was passed for retributive reasons. The Ordinance states that the Law Director may take "whatever action is necessary, legal or otherwise . . ." to recover plaintiff's salary. The *legal or otherwise* language, along with the council's decision to publish the Ordinance and Resolution in local

> newspapers, evinces a desire to punish plaintiff by confiscating his property without benefit of trial.

April 27, 1993, Memorandum Opinion, App. E at 35a.

Further, the District Court held the legislation was a violation of Zilich's First Amendment rights since it was passed with the punitive reasons to retaliate against Zilich and destroy him politically. (App. E at 36a-37a). The District Court found that genuine issues of material fact remain to be tried by a jury.

The Court of Appeals for the Sixth Circuit in overruling the District Court stated:

> Because the ordinance simply authorizes the law director to seek collection of Plaintiff's salary, "no feature of the challenged Act falls within the historical meaning of legislative punishment." *Nixon*, 433 U.S. at 475.

App. C at 10a.

Relying on Section 11 of the Garfield Heights City Charter, the court ruled that the council has the authority to determine the qualifications of its own members. Since that power is a legislative function it is not subject of a Bill of Attainder. Addressing the First Amendment issue the court found no violation of Zilich's rights based upon the Ordinance and Resolution. The Resolution was a reflection of the council's opinion without the force of law. The Ordinance merely authorized the Law Director to file a lawsuit against Zilich. The court found neither to be a violation of Zilich's First Amendment freedom of speech. The Court of Appeals affirmed the District Court's judgment on Zilich's First Amendment claims based on

harassment and returned the case to the District Court for trial on the remaining issues.

It is with the Court of Appeals decision on the Bill of Attainder and First Amendment claims arising out of the City Ordinance that Petitioner takes issue.

REASONS FOR GRANTING THE WRIT

This case presents important questions which impact upon the right of every United States citizen to be free from Bills of Attainder proscribed by Article I, Section 10 of the Constitution of the United States and to be free from retaliation by public officials for the exercise of free speech. The issues are important ones since the Sixth Circuit's opinion exposes every former legislator to the punitive whims of current legislative members. Whether the Court of Appeals is correct that a sitting legislature has the authority to determine that former members intentionally violated "standing" issues, *i.e.*, age, residency, or citizenship, will impact on every legislative body and on every former legislator.

If left unreviewed, any former legislator, at any time, may be legislatively determined to be guilty of intentionally violating the law simply because the current legislators determine that the former member was unqualified to hold office. Retaliation for the exercise of free speech in opposition to the majority's opinion can be imposed under the guise of judging the qualifications of the former legislator. No judicial trial will be required because the legislature is simply exercising its inherent authority to determine the qualifications of its own members.

Without benefit of notice hearing, or judicial trial, a former legislator can be deprived of his title and the rights and privileges earned and vested during the course of his public service. His

reputation can be stigmatized through the stroke of a legislative pen. Property can be subject to liens or attachment or wages garnished merely because the legislature determines that the former legislator held office illegally. The protections of notice, hearing, and judicial trial will not be afforded.

If left unreviewed a legislative body dominated by one party could enact a law that prior officeholders had intentionally violated statutes and were unqualified to hold office. The law could order the chief law enforcement officer to take whatever action necessary to recoup the illegal officeholder's back pay. Pensions could be cancelled, medical policies discontinued.

The issues are of tremendous public importance. No reasonable legislature should enact a statute holding that a former member of their body was unqualified and seeking his back pay because that former member intentionally violated the law. The Court of Appeals decision herein implicates enormous legislative power which more properly belongs in the realm of judicial determination. The Bill of Attainder provision of the United States Constitution is one of such manifest importance that this Court should grant certiorari. No former political officeholder should be determined to have intentionally violated the law by mere legislative *fiat*. In the unique factual scenario of this case, the court has the opportunity to settle the issue that a former councilman cannot be found to have violated the City's Charter without benefit of judicial trial. This Court can seize the opportunity to affirm the applicability of the Bill of Attainder to this type of legislative judgment before such ordinances becomes endemic.

A. An Ordinance Is a Proscribed Bill of Attainder Where It Legislatively Determines That a Former Councilman Intentionally Violated the City's Charter and Directs the Law Director to Take Whatever Action Is Necessary, Legal or Otherwise, to Recover the Former Councilman's Pay.

The use of the Bill of Attainder proscription to prohibit legislative abuse has long been authorized and upheld by this Court. In *United States v. Brown,* 381 U.S. 437, 85 S. Ct. 1707 (1965) Chief Justice Warren reviewed the historical significance of the Constitution's Bill of Attainder proscriptions and its application. The opinion cites the significant historical precedent, the intentions of this country's founding fathers, and the importance of safeguarding every individual from legislative tyranny. The opinion held:

> . . . the best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply — trial by legislature.
>
> The Constitution divides the National Government into three branches — Legislative, Executive and Judicial. This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.

85 S. Ct. at 1711-1712.

Throughout the history of this country the Bill of Attainder proscription has served to protect those subject to the whim of the legislature's displeasure. It has acted to protect, among others, communist party members, *United States v. Brown, ibid.;* priests and clergymen, *Cummings v. State of Missouri,* 4 Wall. 277, 18 L. Ed. 356 (1866); attorneys, *Ex Parte Garland,* 4 Wall. 333, 18 L. Ed. 366 (1886); and employees of the executive branch, *United States v. Lovett,* 328 U.S. 303, 66 S. Ct. 1073 (1946).

In each case whether legislation is a Bill of Attainder requires inquiry into whether the law (1) specifies an individual group of persons; (2) inflicts punishment; and (3) lacks a judicial trial. *Selective Service System v. Minn. Public Int. Research,* 468 U.S. 841, 104 S. Ct. 3348 (1984).

All of the elements of the Bill of Attainder are present in the instant case. The Ordinance specified just one person — Zilich.[4] It imposed punishment — that is, attacked his wages, forfeited his former office and revoked pertinent rights and privileges. Finally, it denied him a trial.

The Court of Appeals has misconstrued the powers of the legislature as they apply to former legislators. No reasonable legislature would believe it had the authority to legislatively determine the qualifications of a former member. No authority exists which permits a sitting legislature to determine the illegality of a former member's position. Neither Section 11 of the City Charter nor Ohio Revised Code § 731.44 refers to the qualifications of former members (App. H at 59a-60a and App. I at 61a). Both Section 11 and R.C. 731.45 contain provisions for expelling its own members — not former members. By definition "member" cannot include a former member who no longer

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4. This factor in and of itself is usually sufficiently persuasive to invoke the Bill of Attainder prohibition. *See United States v. Lovett, supra.*

participates in the legislative process. The Court of Appeals erred in extending such power and this Court should seize the opportunity to correct this misconstruction.

Political rights have long been recognized as protected by the United States Constitution. This disqualification of Zilich from his former office should not be authorized by an act of council which opined that Zilich illegally held office. The council's opinion — just as Congress' opinion that *Lovett* and others were communist — is irrelevant and cannot provide justification for the legislative denial of Zilich's rights and privileges.

Certiorari should be granted so that this Court can reverse the error of the Court of Appeals judgment. This Court can confirm that the Bill of Attainder prohibits all legislative acts which unlawfully infringe on the rightful powers reserved to the judiciary.

B. The Enactment of the Ordinance Was in Retaliation for the Councilman's Prior Expression on Matters of Public Concern and Violates the Petitioner's Right to Freedom of Speech as Protected by the First Amendment.

The second important issue requiring review by this Court is the Court of Appeals decision that the Ordinance and Resolution were not retaliation for Petitioner's exercise of free speech. The Court of Appeals holding is in error when viewed in light of the totality of the circumstances. Herein the Respondents — all official representatives of the City of Garfield Heights — knew that the issue of the Petitioner's qualification was dead. Each of them before enacting this legislation had reviewed the transcript of the Petitioner's explanation of how he met the requirements of the Charter. Each of them knew of the threats, vandalism and personal attacks that had occurred. Several of them had authored these attacks.

The purpose of the legislation was punitive and continued the vendetta to destroy him. The language of the Ordinance and Resolution was drafted with the intent to enact into law the official policy of the City of Garfield Heights to threaten and punish Zilich for his speech on matters of public concern. What reasonable explanation can be offered to include in the language of the Ordinance the threat to recoup his pay by whatever means necessary — legal or otherwise — other than to threaten him? The inclusion of that language is a clear indication that this was nothing more than another threat letting the Petitioner know that the same people who authored the prior threats and physical violence were behind this Ordinance.

Retaliation by public officials against an individual for the exercise of his First Amendment rights is prohibited. *See Perry v. Sinderman,* 408 U.S. 593, 92 S. Ct. 2694 (1972); *Hall v. Sutton,* 755 F.2d 786 (11th Cir. 1985); *Eaton v. Newport,* 975 F.2d 292 (6th Cir. 1992); and *Fraternal Order of Police, Hobart Lodge #121, Inc. v. Hobart,* 864 F.2d 551, 553 (7th Cir. 1988). Retaliation against a former legislator disguised under the veil of acting under the alleged authority of a City Council to judge the qualifications of its members is just as prohibited. Former members include all who held the seat — both dead and alive. None can now rest in the assurance that their former seats can not be legislatively removed without benefit of the protection of judicial trial. Upholding the Court of Appeals decision jeopardizes each of their reputations and right to hold themselves out as former officeholders. It exposes their property to attack.

The Court of Appeals ignored the reprehensible intent and illegal character of the Ordinance. By doing so the court lent credibility where none is deserved. The error is magnified when reviewing a motion for summary judgment wherein the evidence must be weighed most favorably to the non-moving party. Had the Court done so there can only be one conclusion — the

Ordinance is a prohibited retaliatory act and a violation of the Petitioner's First Amendment rights.

This issue needs to be reviewed. The facts and evidence on the record before the District Court clearly established the violation of the Petitioner's First Amendment rights. The Ordinance is an imposition of a retaliatory sanction for Zilich's speech on matters of public concern. Certiorari should be granted.

CONCLUSION

Because of the impact of the Court of Appeals decision on the Bill of Attainder and First Amendment protections of the United States Constitution, this case requires review. It presents important questions as they relate to the power of a legislature to retaliate against opposition voiced by former political officeholders under the guise of the exercise of judging the qualifications of those former members. The Petitioner requests this Court issue certiorari to review these issues.

Respectfully submitted,

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APPENDIX A — NOVEMBER 29, 1994 SIXTH CIRCUIT ORDER GRANTING MOTION TO STAY THROUGH FEBRUARY 1, 1995

Case No: 93-3511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE ZILICH

Plaintiff - Appellee

v.

CITY OF GARFIELD HTS, et al.;

Defendant

THOMAS J. LONGO, Individually and as Mayor of the City of Garfield Hts., Ohio; DAVID E. MACK, Individually and as Law Director of the City of Garfield Hts., Ohio; NANCY J. MARINCIC, Councilwoman and Individually; ROSE MARIE LOVANO, Councilwoman and Individually; JOSEPH SUSTER, Councilman and Individually; MICHAEL ABELLA, Council President and Individually; WILHELM G. SPIEGELBERG, Assistant Law Director and Individually

Defendants - Appellants

ORDER

Upon consideration of the motion of the appellant to stay the mandate pending application to the Supreme Court for a writ of certiorari,

Appendix A

It is ORDERED that the motion be and it hereby is GRANTED. The stay of mandate shall be in effect until February 1, 1995. Failure to apply for certiorari on a timely basis shall result in issuance of the mandate. Issuance of the mandate will be stayed pending a ruling by the Supreme Court.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX B — NOVEMBER 3, 1994 SIXTH CIRCUIT ORDER DENYING PETITIONS FOR REHEARING

No. 93-3511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE ZILICH,

Plaintiff-Appellant,

v.

CITY OF GARFIELD HEIGHTS, ET AL.,

Defendants,

THOMAS J. LONGO, ETC., ET AL.,

Defendants-Appellants.

ORDER

BEFORE: MERRITT, Chief Judge; MILBURN and SILER, Circuit Judges.

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original hearing panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully

considered upon the original submission and decision of the case. Accordingly, the petitions are denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

APPENDIX C — SEPTEMBER 1, 1994 SIXTH CIRCUIT DECISION OVERRULING IN PART AND AFFIRMING IN PART, PUBLISHED

No. 93-3511

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE ZILICH,

Plaintiff-Appellee,

v.

THOMAS LONGO; DAVID MACK; NANCY MARINCIC; ROSE LOVANO; JOSEPH SUSTER; MICHAEL ABELLA; and WILHELM SPIEGELBERG,

Defendants-Appellants.

ON APPEAL from the United States District Court for the Northern District of Ohio

Decided and Filed September 1, 1994

Before: MERRITT, Chief Judge; and MILBURN and SILER, Circuit Judges.

MERRITT, Chief Judge. The defendants, the mayor of a small Ohio town and other local officials, passed a city council resolution denouncing plaintiff, a former city council member, allegedly in retaliation for his political opposition to the mayor. The plaintiff also alleges threats of physical harm by defendants. Plaintiff filed suit under 42 U.S.C. § 1983 making numerous claims, three of which – a bill of attainder claim and two types of

Appendix C

First Amendment claims – are the subject of this interlocutory appeal. The district court denied defendants' summary judgment motion based on qualified immunity from liability on the claims. It held that there was a material dispute of fact on these three issues. To determine whether defendants are entitled to qualified immunity, we must decide as a preliminary matter if the resolution and ordinance in question could constitute (1) a bill of attainder or (2) a violation of plaintiff's First Amendment rights and (3) whether alleged threats of physical violence against plaintiff in retaliation for his political criticism could constitute a violation of his right of free speech by defendants under color of law.

I. Facts

The plaintiff, George Zilich, was formerly a member of the city council in Garfield Heights, Ohio. The defendants in this appeal are Thomas Longo, the mayor of Garfield Heights; David Mack and Wilhelm Spiegelberg, the law director and assistant law director; and Nancy Marincic, Rose Marie Lovano, Michael Abella and Joseph Suster, members of the city council who voted for the resolution and ordinance challenged by plaintiff.

After Zilich's election in 1989, the defeated incumbent claimed that Zilich failed to meet the city's three-year residency requirement to be a member of the council and filed suit to enjoin Zilich from taking office. The state court refused to enter an injunction on various grounds, one of which was that the city council is the sole judge of the qualifications of its own members. After taking office, several individuals attempted to challenge Zilich's qualifications before the council but the council refused to disqualify him.[1]

1. The residency question as to Zilich is unclear but is not a matter that need

(Cont'd)

Appendix C

During his two-year term, Zilich was a thorn in the side of the mayor and his administration. He challenged the city's fiscal policies, its contract bidding procedures and the actions of the police and law departments, among other issues.

For purposes of this appeal, we assume the existence of the following facts:

During this same period, Zilich's home was vandalized, his tires were slashed, his car windows were shot out and he and his wife received anonymous phone calls threatening bodily harm. For example, just before a meeting on the mayor's budget proposal, an anonymous caller threatened "see you tonight asshole, you're a dead man." Around this same time, Thomas Furth, an assistant law director for the city, told Zilich about the mayor's increasing hostility toward him. In addition, a policeman investigating the shooting of Zilich's car told him that "these type things would stop if he would merely stop his criticisms and allegations against the mayor and the law department."

Furth actually attended meetings in which the mayor and others discussed silencing Zilich and provided detailed testimony about the serious nature of these threats. According to Furth, the mayor and his staff discussed slapping Zilich around, shooting him, hiring someone to break his legs, "cutting him" because he

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(Cont'd)
concern us. He grew up in Garfield Heights and lived there on and off for thirty years. In 1986, however, he was living and registered to vote in another suburb of Cleveland. He purchased a home in Garfield Heights in June 1987, two and half years before the 1989 election. *After* he moved, the city changed the residency requirement from one to three years. Thus, there remain questions as to whether Zilich met the requirement because he had lived there previously with the intent to establish residency, and secondly, whether he was "grandfathered" in because he established his residence prior to the change in requirements.

was a "bleeder" and tearing his throat out. These threats also involved terrorizing Zilich's family, and one specific plan included sexually assaulting Mrs. Zilich. The defendants maintain that all of these threats were "jokes," but Furth testified that none were made in a joking manner.

In 1991 Zilich did not run for reelection. On its first night of business, the new city council passed a resolution and ordinance[2]

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2. Resolution 54-1991 stated:

> A Resolution expressing the disapproval and outrage of the Council of the City of Garfield Heights in regard to the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former councilman George Zilich and demanding that he return all compensation received during his tenure as councilman because of his intentional violation of the charter provisions of this city. . . .
>
> *SECTION 1.* The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in renumeration (sic) for his service as Councilman because of his being in violation of this provision of the City Charter.

Ordinance 112-1991 provided:

> An ordinance authorizing and directing the Director of Law to take whatever action is necessary, legal or otherwise, to collect the salary received by former

(Cont'd)

stating that Zilich had violated the city charter's residency requirement and that he had never been qualified to hold office. The ordinance also authorized the law director to collect the salary paid to Zilich during his tenure. Zilich maintains that the resolution was part of the ongoing conspiracy to harass and intimidate him, and was meant to threaten him and to ruin his political career.

The district court viewed these events as related, inferring that the evidence supported a common conspiracy to ruin plaintiff's reputation and political future. It held that the resolution and ordinance constituted a bill of attainder and that their passage was in retaliation for plaintiff's exercise of his First Amendment rights. We conclude that the resolution and ordinance are not a bill of attainder and that their passage did not violate plaintiff's clearly established First Amendment rights; therefore, defendants are entitled to qualified immunity on these claims. If proven, however, the other allegations of harassment clearly would violate the First Amendment.

II. Bill of Attainder Claim

Zilich argues that the resolution and ordinance passed by the city council constitute a bill of attainder adopted in violation of Article I § 10 of the Constitution ("No State shall . . . pass any Bill of Attainder"). A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial."

(Cont'd)

> Councilman George Zilich during his previous two year term as Councilman at which time he was intentionally violating Section 9 of the Charter of the City of Garfield Heights.

Appendix C

Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846-47 (1984) (quoting *Nixon v. Administrator of General Services,* 433 U.S. 425, 468 (1977)). Thus, there are three essential elements to a bill of attainder: "specificity . . ., punishment, and lack of a judicial trial. "*Selective Service,* 468 U.S. at 847. Applying these factors, the court below found that "[t]he Resolution and Ordinance in question represents a classic case of a bill of attainder" and noted that "the Ordinance and Resolution was passed without the benefit of a trial, and remains an enforceable piece of legislation." The district court rejected the defendants' qualified immunity defense and held that the council was not judging the qualifications of one of its members, but instead sought "to deprive an individual of his property without the benefit of a trial." In doing so the court held that "the defendants' purpose in passing the legislation was punitive in nature."

We believe the district court misunderstands the situation for several reasons. First, the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport to confiscate or take title to any of Zilich's property. Whether the city actually recovers will depend entirely on a court judgment, not on a legislative usurpation of the judicial power to adjudicate an individual dispute. Because the ordinance simply authorizes the law director to seek collection of plaintiff's salary, "no feature of the challenged Act falls within the historical meaning of legislative punishment." *Nixon,* 433 U.S. at 475.

Second, § 11 of the Garfield Heights City Charter says that the "Council shall be the judge of the election and qualifications of its members." This same power is also given to non-charter

municipalities by a state statute which provides that "the legislative authority of a municipal corporation shall be the judge of the election and qualifications of its own members." Ohio Rev. Code § 731.44. Both the charter and the state constitution reflect the well-settled principle that a legislature traditionally has the power to judge the so-called "standing" qualifications (age, residency, citizenship) of its membership. *See generally Powell v. McCormack,* 395 U.S. 486, 518-549 (1969); *Hitt v. Tressler,* 447 N.E.2d 1299, 1302 (Ohio 1983).

Plaintiff has not cited, and our research has not disclosed, a single case in which a court has held that judging a member's qualifications constitutes a bill of attainder. The Bill of Attainder Clause is a "safeguard against legislative exercise of the judicial function, or more simply — trial by legislature." *Song v. Elyria,* 985 F.2d 840, 844 (6th Cir. 1993) (citation omitted). The "section proscribing bills of attainder . . . establishes that there are certain types of decision that are . . . inappropriate for *legislative* resolution. . . . [T]he bill of attainder clause should be viewed . . . as necessary to the effective separation of powers." Note, *The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause,* 72 Yale L.J. 330, 343 (1962) (emphasis in original). The legislative act of judging one's own members cannot be deemed a matter inappropriate for legislative resolution when the city charter specifically grants the council this power. Where the role is traditionally a legislative function, not a judicial function, the Bill of Attainder Clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend or otherwise discipline a member. They have done so under English and American law for centuries. *Powell,* 395 U.S. at 522-38 (discussing the impact of English precedent on the Framers' adoption of standing qualifications and the authority of Congress to expel members). The absence of

a trial here is not problematic or even surprising because judging a member's qualifications is a legislative function, not a judicial one.

Finally, the fact that the city council's action came after the plaintiff was no longer a member does not matter. A state court may decide that the city council exceeded its power under state law precisely because plaintiff was a former member. This is a matter more properly to be determined under state law. The city council may authorize its city attorney to initiate a lawsuit against a former member of that body. It is not a proper role for federal courts to determine these local political matters under the Bill of Attainder Clause.

III. First Amendment Claim

Plaintiff argues that the resolution and ordinance in question were passed in retaliation for his expressions of hostility toward the mayor and his criticisms of the mayor's conduct and that such a pattern of retaliatory voting and official legislative action violates the Free Speech Clause. As we have previously said, legislative bodies are entitled to judge and express their opinions concerning the qualifications of members based on residency, and they have the power to authorize the law director to sue on behalf of the city. A legislative body does not violate the First Amendment when some members cast their votes in opposition to other members out of political spite or for partisan, political or ideological reasons. Legislators across the country cast their votes every day for or against the position of another legislator because of what other members say on or off the floor or because of what newspapers, television commentators, polls, letter writers and members of the general public say. We may not invalidate such legislative action based on the allegedly improper motives of legislators.

Appendix C

Congress frequently conducts committee investigations and adopts resolutions condemning or approving of the conduct of elected and appointed officials, groups, corporations and individuals. Members often vote to do so, at least in part, because of what the target of their investigation or resolution has said or for purely partisan and ideological reasons. The First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions. *See generally Bond v. Floyd,* 385 U.S. 116, 135-36 (1966) ("The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy"). This principle protects Zilich's right to oppose the mayor without retribution and it also protects defendants' right to oppose Zilich by acting on the residency issue which was left unresolved for over two years.

Voting on legislative resolutions expressing political viewpoints may itself be protected political speech.[3] Such resolutions are simply the expression of political opinion They do not control the conduct of citizens or create public rights and duties like regular laws. *Little v. North Miami,* 805 F.2d 962, 967

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3. *Compare Miller v. Hull,* 878 F.2d 523, 532 (1st Cir.) (probably unassailable that elected officials' votes come within the freedom of speech guarantee of the First Amendment), *cert. denied,* 493 U.S. 976 (1989) *with Spallone v. United States,* 493 U.S. 265, 302-03 n.12 (1990) (dissenting opinion) (four members of Supreme Court rejecting petitioner's claim that voting is "core political speech" and noting that "attempt to recharacterize the common-law legislative immunity doctrine into traditional First Amendment terms is unpersuasive"). The D.C. Circuit also held that a councilmember's vote is speech protected by the First Amendment. *Clarke v. United States,* 886 F.2d 404 (D.C. Cir. 1989) (right to vote freely within broad protections of the First Amendment). This opinion, however, was vacated as moot by an *en banc* panel of the D.C. Circuit. *Clarke v. United States,* 915 F.2d 699 (D.C. Cir. 1990).

(11th Cir. 1986) ("resolution is 'merely declaratory of the will of the corporation in a given matter' and not 'a continuing regulation [or a] permanent rule of government' "). A legislative resolution expressing the political view that flag burning, abortion, lewd films or illegitimacy are morally wrong is not a "law . . . abridging the freedom of speech." It is not a law at all in the normal sense of the word.

The legislative body here passed a *resolution* "expressing the disapproval and outrage of the council." It does not have the effect of a "law." The ordinance merely authorizes the law director to file a lawsuit against plaintiff. As noted in the bill of attainder section above, the ordinance contains no punishment or penalty. We therefore do not consider these two hortatory measures to violate plaintiff's First Amendment rights.

This appeal is before us solely on the issue of qualified immunity. Unlike many such cases, however, we do not discuss whether the rights asserted by plaintiff are "clearly established" because even accepting plaintiff's allegations as true we do not believe *any* constitutional violation has occurred. Our "substantive" rejection of plaintiff's claim effectively disposes of the qualified immunity issue. While this type of case is unusual, it is not unprecedented. In *Siegert v. Gilley,* 500 U.S. 226, 232 (1991), the Supreme Court set forth the appropriate analysis in the qualified immunity context where the court makes the legal determination that plaintiff fails to state a claim:

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has

> asserted a violation of a constitutional right at all. Decision of this purely legal question permits courts expeditiously to weed out suits which fail the test without requiring a defendant who rightly claims qualified immunity to engage in expensive and time consuming preparation to defend the suit on the merits.

As in *Siegert,* the claim here "failed at an analytically earlier stage of the inquiry into qualified immunity: His allegations, even if accepted as true, did not state a claim for violation of any rights secured to him under the United States Constitution." *Id.* at 227. Thus, as to the bill of attainder and First Amendment claims involving the resolution and ordinance, all defendants are entitled to qualified immunity.

IV. First Amendment/Harassment Claim

The alleged threats of physical violence outside the legislative arena by some defendants in response to plaintiff's opposition during his term in office present a different question because "[r]etaliation by public officials against the exercise of First Amendment rights is itself a violation of the First Amendment." *Fraternal Order of Police Hobart Lodge # 121, Inc. v. Hobart,* 864 F.2d 551, 553 (7th Cir. 1988); *see also Reichert v. Draud,* 701 F.2d 1168, 1170 (6th Cir. 1983); *Perry v. Sindermann,* 408 U.S. 593 (1972). The district court correctly held that defendants are not entitled to qualified immunity for this misconduct.

As noted above, Zilich's allegations of harassment are supported by the testimony of Thomas Furth, who attended

meetings in which the mayor and others discussed threatening Zilich, slapping him around, breaking his legs, "cutting him" and intimidating him. These threats coincided with the vandalism and harassing telephone calls that plaintiff and his wife experienced. The defendants maintain that the threats were "jokes," but Furth testified that none were made in a joking manner. Only a trial will permit Zilich the full opportunity to prove defendants' involvement in the actions taken against him. The defendants respond that these actions, even if true, were "anonymous" and thus cannot provide the basis for a suit under 42 U.S.C. § 1983. Here, it is alleged that the mayor and other city officials – on city time and in city offices plotted to injure plaintiff for his political views. In light of the resolution and ordinance demonstrating hostility toward plaintiff, these allegations, if proved, are sufficient to support a conclusion that defendants were acting under color of official right.

We also agree with the findings of the district court that Zilich's First Amendment right of free speech was "clearly established" for qualified immunity purposes. The law is well settled in this Circuit that retaliation under color of law for the exercise of First Amendment rights is unconstitutional, and "retaliation claims" have been asserted in various factual scenarios. *Meyers v. City of Cincinnati, 979* F.2d 1154 (6th Cir. 1992) (firemen dismissed); *Boger v. Wayne County, 950* F.2d 316 (6th Cir. 1991) (county employee in Medical Examiner's Office transferred); *Draud,* 701 F.2d at 1170 (change in public school teacher's duties); *Hildebrand v. Board of Trustees,* 662 F.2d 439 (6th Cir. 1981) (university professor denied tenure), *cert. denied,* 456 U.S. 910 (1982); *Johnson v. Avery,* 393 U.S. 483 (1969) (prisoner retaliated against for seeking access to courts). No reasonable official could possibly believe that it is constitutionally permissible to retaliate against a political

opponent with physical threats, harassment and vandalism. Because officials "of reasonable competence could [not] disagree on this issue, immunity should [not] be recognized." *Mumford v. Zieba*, 4 F.3d 429, 432 (6th Cir. 1993).[4]

Thus we conclude that the district court erred in holding that the bill of attainder and First Amendment claims based on the resolution and ordinance should go forward to a trial on the merits. We agree that the First Amendment claim based on threats or acts of physical violence should go to trial. Accordingly we affirm in part and reverse in part and remand the case for further proceedings consistent with this opinion.[5]

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4. Because the surviving First Amendment retaliation claim is based on the prior harassment, those defendants who are not alleged to have taken any actions to harass plaintiff are entitled to dismissal. On remand, the district court should determine which defendants should remain in the case on this claim.

5. The district court also denied summary judgment on Zilich's state law defamation claim involving the passage and publication of the resolution and ordinance. This ruling is a collateral order which is not subject to review. *Marrical v. Detroit News, Inc.*, 805 F.2d 169 (6th Cir. 1986). The court in *Marrical* discussed review of state immunity issues, distinguishing between state immunity from suit (which would permit an interlocutory appeal) and immunity from liability (which would not). *Id.* at 173-75. Here, the Ohio immunity statute appears to grant immunity from liability, not suit. Ohio Rev. Code § 2744.03(A) ("immunities may be asserted to establish non-liability"). Accordingly, the Court declines to address this question.

APPENDIX D — APRIL 27, 1993 UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, JUDGMENT ENTRY

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 188

George Zilich,

Plaintiff,

vs.

The City of Garfield Heights et al.,

Defendants.

JUDGMENT ENTRY

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that defendants' motions for summary judgment on plaintiff's substantive and procedural due process and equal protection claims are granted. Summary judgment is denied on plaintiff's bill of attainder, First Amendment, and defamation claims. Defendants are also denied qualified immunity on plaintiff's bill of attainder and First Amendment claims.

Appendix D

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U.S. District Judge

Appendix D

APPENDIX

The following are excerpts of and references to the transcript of the deposition of Thomas Furth taken on June 1, 1992.

1) Furth testified that in a meeting conducted in March, 1990 that "Director Obert [Financial Director Richard Obert] was talking about George Zilich and how he has to be stopped and that there have to be ways to stop him. The Mayor indicated that maybe it was time to sick Spiegelberg on Zilich." Depo. at 41.

Furth testified that in early 1990 Mayor Longo indicated that "George Zilich is a very dangerous man. He's far more dangerous than the bums that were thrown out of council because they were stupid and George was smart. That makes him dangerous. That if George Zilich didn't shape up and respond to a meeting or meetings that the Mayor was going to have with him when he was going to make clear how he needed to behave, then they would get rid of him." Depo. at 35.

Immediately follow a council meeting in August, 1990 Furth met with Mack, Longo, Spiegelberg, and Stachewicz to consider ways to "destroy Zilich." Depo. at 96. One such way discussed was to encourage Andrew Douglas, Associate Justice of the Ohio Supreme Court, and Furth's uncle, to place pressure on the Republican Party to drive plaintiff out of politics. Depo. at 99.

2) Furth testified that a series of meetings were held to determine how to prevent plaintiff from opposing the Mayor and his plans. "What the Mayor said was that politically he had to find a way to deal with George Zilich, and the way that they were looking at hitting him initially was on his residency and issues surrounding his residency in his ward in the City of Garfield Heights." Depo. at 28.

Appendix D

In a March 1990 meeting, Mayor Longo indicated that "even though the residency was probably a dead issue legally, it wasn't a bad issue politically and the more bad will they could stir up for George city wide, and particularly in his ward the better, because it might chase him out of town." Depo. at 43

Furth testified that in April, 1990 Mack and Longo indicated that they planned to use the residency issue to drive plaintiff out of politics and out of Garfield Heights. Depo. at 56.

3) In a March 1990 meeting, Mayor Longo indicated that "even though the residency was probably a dead issue legally, it wasn't a bad issue politically and the more bad will they could stir up for George city wide, and particularly in his ward the better, because it might chase him out of town." Depo. at 43.

In an April 1990 meeting at the restaurant Cleveland PM, with Furth, Mayor Longo, Director Obert, and Barb McCloskey, the director of senior citizens' activities in Garfield Heights, "the conversation was that George Zilich needed to be stopped and the residency issue needed to become a public issue, a political issue, even if it was no longer a legal issue. Depo. at 45.

4) On one occasion, defendant Spiegelberg told Furth that a dirty tricks campaign against Furth had been initiated and that harassing phone calls were going to be placed "at all hours of the evening to George's house . . . particularly when his wife was home and he wasn't." Depo. at 49.

Defendant Spiegelberg also told Furth "Well, we are going, we are going to concentrate on terrorizing, his word [sic], terrorizing or intimidating his wife when he's not around. He travels a little bit, and we are going to find out when he's traveling so that we can intimidate his wife. Depo. at 77.

Appendix D

Furth testified that Mayor Longo indicated that "he had taken care of other people before. He said that he was going to take care of George Zilich. He told me that he might need my help in this. . . .

He then switched to the topic of George Zilich's wife. He, and this is something that in these words I had not, I have not mentioned to anybody before. He indicated that George's wife was a whore and that what she needed was a good fuck because obviously George Zilich couldn't provide that.

Well, how would she feel and how would George feel if he found some people that could provide that and dragged her out of her house and took care of her, and that maybe then pretty boy and the Barbie-doll couple would be out of Garfield Heights once and for all and understand that the people of Garfield Heights are not like them. . . ." Depo. 110-111.

5) Furth testified that Mayor Longo said to him that "for being a smart person [plaintiff], he was acting dumb because he wasn't getting the message that serving on the council for opposing mayor wasn't worth it, so he was going to talk to friends or maybe ask me or Spiegelberg to talk to people, also, but that he was going to, going to get the message to George one way or the other and what he [plaintiff] needed was his legs broken and then maybe he wouldn't find it worth it anymore, and that if something happened to his wife or something happened to George where he couldn't walk anymore, then maybe the fair-haired boy and the fair-haired couple of Garfield Heights would be finished once and for all.

He then said another alternative would be cutting him, and I looked at him and he said, You didn't know that? He said, all we

have really got to do is get him in a fight with somebody who can't be traced back to us and cut him.

I said, Cut him?

He said, Yeah, because he's a bleeder.

I said, He's a what?

He's a bleeder, said the Mayor. He's one of those people that has a disease where you bleed excessively if you're cut." Depo. at 113-114.

6) Furth testified that when Mayor Longo discussed plans to harass and intimidate plaintiff's wife that it was a serious conversation and that Mayor Longo was not joking when he expressed his desire to harm plaintiff's wife. Depo. at 111.

In response to a question regarding a statement made by Director Obert that the defendants should pursue the issue of "cutting plaintiff because he is a *bleeder,*" Further testified "I, in this conversation I'm referring to or any other time, never saw anybody joke about George Zilich in any way." Depo. at 131.

7) Furth testified that the defendants hired the Cleveland law firm of Arter & Hadden, and a law firm in Washington D.C. to research the residency issue. Depo. 29. Furth further testified that despite their efforts, they were unable to develop a case against plaintiff on the residency requirement.

APPENDIX E — APRIL 27, 1993 UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF OHIO, EASTERN DIVISION, MEMORANDUM OPINION

DOWD, J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

CASE NO. 1:92 CV 188

George Zilich,

Plaintiff,

vs.

The City of Garfield Heights et al.,

Defendants.

MEMORANDUM OPINION

I. INTRODUCTION AND PROCEDURAL HISTORY

Plaintiff George Zilich (plaintiff) brings this 42 U.S.C. section 1983 action against the City of Garfield Heights; Garfield Heights City Council members Nancy Marincic, Rose Marie Lovano, Joseph Suster, and Michael Abella; Law Director for the City of Garfield Heights, David Mack; Assistant Law Director, Will Spiegelberg; and Mayor of Garfield Heights, Thomas Longo.

Appendix E

Plaintiff, a former Garfield Heights council member, claims that the defendants conspired to ruin his political career through the passage of a resolution and ordinance calling for the forfeiture of plaintiff's salary as councilman because he did not satisfy the residency requirements.

In his initial Complaint filed January 27, 1992, plaintiff claimed that the underpinnings of his § 1983 action were violations of his substantive and procedural due process and equal protection rights.[1]

On December 3, 1992, the defendants moved for summary judgment on plaintiff's federal claims, (docket No. 91). Plaintiff filed a response in opposition, (docket No. 113), and the defendants replied, (docket No. 120). Defendants also filed a separate summary judgment motion on plaintiff's state law defamation claim, (docket No. 93). Plaintiff responded to this motion as well, (docket No. 115) and defendants correspondingly filed a reply, (docket No . 118) .

On January 12, 1993, the Court *sua sponte* granted the plaintiff leave to file an Amended Complaint containing a First Amendment and bill of attainder claim. On January 26, 1993, defendants moved for summary judgment on plaintiff's newly added claims, (docket No. 134). Plaintiff opposed the motion, (docket No. 136), and defendants filed a reply in support of their motion, (docket No. 138).

Defendants also moved for summary judgment on the basis

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1. In his first Complaint, plaintiff also brought claims of civil assault, defamation, and RICO violations. The civil assault and RICO claims were dismissed by the Court's June 24, 1992 Order. Plaintiff still maintains his pendent state defamation claim.

of qualified immunity, (docket No. 92). Plaintiff has opposed this motion as well, (docket No. 114), and defendants have filed a reply, (docket No. 119).

For the following reasons, the Court grants the defendants' motions for summary judgment on plaintiff's procedural and substantive due process and equal protection claims. Defendants are denied summary judgment on plaintiff's bill of attainder, First Amendment and defamation claims.

II. FACTUAL BACKGROUND

Plaintiff served as a member of city council for the city of Garfield Heights, Ohio from 1988 to 1990. After plaintiff's term had expired, it was alleged by members of the council that plaintiff had not met the residency requirements for service on the city council. On November 11, 1991, the council passed an Ordinance[2] directing the Law Director of the city of Garfield Heights to:

> . . . take whatever action is necessary, *legal or otherwise,* to collect the salary received by former councilman George Zilich during his previous two year term as councilman at which time he was intentionally violating Sec. 9 of the charter of Garfield Heights. (emphasis added).

The Ordinance also directed the Law Director to distribute a copy of the Ordinance to the local media. The Ordinance was published in a number of local papers including the Cleveland Plain Dealer.

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2. Ordinance No. 112-1991.

Appendix E

Plaintiff claims that since the Ordinance was passed, his car windows have been shot out, his tires have been slashed, he has received threatening phone calls, and he has received threats to his person, his family and his property from city employees. Plaintiff claims that these events are a direct result of the defendants' conspiracy to "destroy him politically." Complaint at par. 27.

Defendants have moved for summary judgment on the basis of qualified immunity claiming that plaintiff has not established the violation of a clearly established constitutional right, and that if such a violation has occurred the defendants could not have reasonably known at the time of the action that they were violating a clearly established constitutional right. Defendants have also moved for summary judgment on each of plaintiff's claims asserting that there are no genuine issues of material facts, and that all undisputed facts lead to the conclusion that plaintiff's claims must fail.

III. SUMMARY JUDGMENT STANDARD

It is well established that when considering a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, "the inferences to be drawn from the underlying facts contained in [affidavit], pleadings, depositions, answers to interrogatories, and admissions] must be viewed in the light most favorable to the party opposing the motion." *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *United States v. Hodges X-Ray, Inc.*, 759 F.2d 557 (6th Cir. 1985); *Tee-Pak Inc. v. St. Regis Paper Co.*, 491 F.2d 1193 (6th Cir. 1974); *Bohn Aluminum & Brass Corp. v. Storm King Corp.*, 303 F.2d 425 (6th Cir. 1962). However, the non-moving party bears the responsibility to demonstrate that summary judgment is inappropriate under Rule 56(e). The

"adverse party may not rest upon the mere allegations or denials of [his] pleadings, but [his] response, by affidavits or otherwise . . . , must set forth specific facts showing there is a genuine issue for trial. If [he] does not so respond, summary judgment, if appropriate, shall be entered against [him]." Fed. R. Civ. P. 56(e).

A court may grant summary judgment only if there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). "[T]he judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* (*citing Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968)). Therefore, "[i]f the evidence is merely colorable, . . . , or is not significantly probative, summary judgment may be granted." *Id.* at 249-250 (citing *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (*per curiam*); *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. at 290). " 'The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.' " *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting *Anderson v. Liberty Lobby*, 477 U.S. at 252)). Moreover, summary judgment is appropriate when the non-moving party "has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In sum, "[t]he inquiry performed is the threshold inquiry of

determining whether there is the need for a trial — whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250.

IV. DISCUSSION

A. *Substantive Due Process.*

Plaintiff claims that the defendants violated his substantive due process rights by "willfully enact[ing] legislation which was directed solely against him and which had no substantial relationship to the public health, safety, morals, or welfare." (Plaintiff's brief at 12). Plaintiff asserts that such conduct "can only constitute oppressive government action." *Id.*

Substantive due process bars "certain arbitrary, wrongful government actions regardless of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1989). A violation of an individual's substantive due process rights will lie only where a right "so rooted in the traditions and conscience of our people as to rank as fundamental" has been denied. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1989) (plurality opinion), *quoting, Sunder v. Massachusetts*, 291 U.S. 97, 105 (1934), *overruled on other grounds, Duncan v. Louisiana*, 391 U.S. 145 (1968). A plaintiff may invoke § 1983 for a substantive due process claim regardless of the availability of state remedies. *Zinermon supra.*

In his Amended Complaint, plaintiff identifies the substantive due process violations that he suffered at the hands of the defendants as: interference with his right to hold public

office; damage to his reputation; threats to his person, his family and his property; and deprivation of his property in the form of the potential back pay. Amended Complaint at par. 59. However, none of these rise to the level of a constitutional deprivation.

Courts have held that there is no constitutional right to hold public office. *Peterson v. Knutson*, 367 F. Supp. 515 (D. Minn. 1973), *aff'd*, 505 F.2d 736 (8th Cir. 1974); *Dupont v. Demper*, 501 F. Supp. 1081 (M.D. La 1980); and *Gruenberg v. Kavanagh*, 413 F. Supp. 1132, 1135 (E.D. Mich. 1976). Similarly, a cause of action under the Fifth Amendment does not lie for damage to one's reputation. *Paul v. Davis*, 424 U.S. 693 (1976). The *Paul* Court held:

> The words "liberty" and "property" as used in the Fourteenth Amendment do not single out reputation as a candidate for special protection over and above other interests that may be protected by state law.

Id. at 701.

Zilich also alleges that the defendants have deprived him of his right to freedom from threats to his person, his family and his property. Mere threats, as opposed to actual deprivations of rights, are not actionable. *Macko v. Byron*, 576 F. Supp. 875, 880 (N.D. Ohio 1983), *aff'd*, 760 F.2d 95 (6th Cir. 1985).

Finally, as to the deprivation of his property, namely his back pay, plaintiff's claim is not ripe as such a deprivation has yet to occur. As of the date of this Opinion, plaintiff is still in possession of the salary he was paid during his term as a councilmember. *Macko, supra* at 880. Finding that plaintiff cannot advance a

clearly established constitutional right, the Court grants the defendants' motion for summary judgment on plaintiff's substantive due process claim.

B. *Procedural Due Process.*

Unlike substantive due process, in a procedural due process claim the "deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law.*" (emphasis in original), *Zinermon supra* at 125, *quoting, Paratt v. Taylor*, 451 U.S. 517, 537 (1981).

"A basic principle of due process under the Fourteenth Amendment is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " *Cherin v. Welchans,* 844 F.2d 322 (6th Cir. 1988), *quoting, Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The notice must be such that it is reasonably calculated to "appraise interested parties of the pendency of the [governmental] action." *Memphis Light Gas & Water Div. v. Craft*, 436 U.S. 1 (1977). Further, the United States Supreme Court has consistently held that the government must provide *some* kind of hearing where an individual can challenge the deprivation in a "meaningful" manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). *See also Mathews v. Eldrich*, 424 U.S. 319, 333 (1976).

At the outset of any due process analysis, the court must find the deprivation of a constitutionally protected liberty or property interest. *Board of Regents v. Roth*, 408 U.S. 564, 572-73 (1971). This property interest need not find its origin in the Constitution,

so long as it is of the type, and of the magnitude contemplated by the Constitution. *Goss v. Lopez*, 419 U.S. 565 (1975).

As the Court has previously determined, plaintiff has not been deprived of a constitutionally protected liberty or property interest. However, even if plaintiff had proven a constitutional deprivation, his procedural due process claim could not survive summary judgment.

Plaintiff claims that he has been deprived of a hearing on the legislation or a chance to clear his name prior to passage of the legislation. However, the Court holds that plaintiff was provided with adequate due process. Prior to the passage of the Resolution and Ordinance, the law director sent plaintiff a letter outlining the questions about the residency issues and offering plaintiff the opportunity to come forward and present proof that he was in compliance with the charter. Plaintiff chose not to respond. Further, plaintiff was present at the council meeting when the legislation was passed. Several citizens rose to speak out against the legislation, but plaintiff chose not to do so, despite the fact that he would have been provided the opportunity upon request.

The Court finds that plaintiff was provided at the council meeting with "an opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews supra* at 333. Since he chose not to exercise his right to a hearing, he cannot now be said to have been denied such a right. Defendants are granted summary judgment on plaintiff's procedural due process claim.

C. *Equal Protection.*

Plaintiff also, using general and vague language, plead a claim of violation of his equal protection rights. Specifically,

plaintiff states in his First Amended Complaint that:

> 63. The Defendants, separately individually, in concert and under color of law deprived Plaintiff of his constitutional rights to:
>
> > (e) Equal protections of the law as guaranteed under the Fourteenth Amendment . . .

The plaintiff never develops his equal protection claim in the First Amended Complaint or in his responsive filings. In fact, plaintiff does not mention this claim in any of his briefs.

"To state a claim under the Equal Protection Clause, a §1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class. *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990), *quoting, Johnson v. Morel,* 876 F.2d 477, 479 (5th Cir. 1989) (*en banc*). "The equal protection concept does not duplicate common law tort liability by conflating all persons not injured into a preferred class receiving better treatment than a plaintiff who alleges tortious injury." *Booher v. United States Postal Service*, 843 F.2d 943, 944 (6th Cir. 1988) (*citations omitted*).

Plaintiff has not alleged or demonstrated that he was a member of a distinct class which the Garfield Heights city officials treated differently. Plaintiff's claim is merely that he was mistreated by the defendants. While such mistreatment may have violated other constitutional rights, it does not amount to an equal protection violation. Defendants are granted summary judgment on plaintiff's equal protection claim.

Appendix E

D. *Bill of Attainder.*

In his Amended Complaint, plaintiff raised for the first time the issue of whether the Ordinance and Resolution adopted by the city council operated as a bill of attainder in violation of Article I, Sec. 9, Cl. 3 of the United States Constitution. A bill of attainder is a "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-47 (1984), *quoting, Nixon v. Administrator of General Services*, 433 U.S. 425, 568 (1977). *See also United States v. Brown*, 381 U.S. 437, 442 (1965). "In analyzing challenged legislation, the Court has applied a 'functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes.' " *Gardner v. City of Columbus Ohio*, 841 F.2d 1272 (6th Cir. 1988), *quoting, Nixon, supra* at 475-76.

The Sixth Circuit, in recent cases, has addressed the issue of unlawful bills of attainder. In *Gardner v. City of Columbus, Ohio*, 841 F.2d 1272 (6th Cir. 1988), the court held that civil ordinances governing fines to be imposed for illegal parking were not bills of attainder because they were not punitive in nature. The Court noted that the purpose of the fines is not to punish but rather is a "part of a comprehensive regulatory scheme [to] defray the cost of providing and regulating parking on city streets." *Id.* at 1278.

The Court revisited the issue of bills of attainder in *Song v. City of Elyria Ohio*, 985 F.2d 840 (6th Cir. 1993). In *Song*, the plaintiffs, female owners and operators of massage parlors, challenged an ordinance which prohibited non-licensed

individuals from giving massages to members of the opposite sex.[3] In finding that the ordinance was not an unlawful bill of attainder, the court noted that the legislation was not targeted at one individual, or a small group of people, but applied equally to all citizens.

The Resolution and Ordinance in question represents a classic case of a bill of attainder. Unlike the legislation passed in *Song,* the Ordinance passed by the Garfield Heights city council does not apply to all citizens equally, but rather is directed at and applies to one individual, namely the plaintiff.

While the defendants agree that the Ordinance and Resolution is directed solely at plaintiff, defendants maintain that the legislation is not punitive, but rather "demonstrates an intent to enforce the residency requirement of the charter so that future candidates will appreciate the importance of that provision." Defendants' reply brief at 15.

However, from the very language of the Resolution the inference can be drawn that the legislation was passed for retributive reasons. The Ordinance states that the Law Director may take "whatever action is necessary, *legal or otherwise,* . . ." to recover plaintiff's salary. (emphasis added). This *legal or otherwise* language, along with the council's decision to publish the Ordinance and Resolution in local newspapers, evinces a desire to punish plaintiff by confiscating his property without benefit of trial.[4] In fact, defendants admit that, in addition to

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3. The Court referred to this practice as "cross massaging."

4. Defendants suggest that the plaintiff will not be deprived of his property absent a trial since the plaintiff will only be ordered by this Court to return his salary

(Cont'd)

recovering plaintiff's pay, the Resolution was passed to express "council's outrage with Zilich's violation of the Charter." Defendants' brief at 17. Once again, leading to the inference that the defendants' purpose in passing the legislation was punitive in nature.

Further evidence suggests, that at the very least defendants Mack, Longo, Spiegelberg and Stacheicz supported the passage of the Ordinance and Resolution in order to punish plaintiff for exercising his First Amendment rights to free speech. In deposition testimony, Thomas Furth, a former assistant law director for the City of Garfield Heights, stated that several defendants, including the mayor and the law director, met on several occasions to discuss ways to prevent plaintiff from challenging certain political issues, such as the mayor's budget proposal, and to punish plaintiff for past attempts to oppose such issues. *See* Appendix at 1.[5] Furth was present at these meetings

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if the defendants are successful in their counter-claim. This position lacks merit. The issue in plaintiff's bill of attainder claim is not the counterclaim, but rather is the Ordinance and Resolution. Regardless of the counter-claim, the Ordinance and Resolution was passed without the benefit of trial, and remains an enforceable piece of legislation.

5. After the plaintiff noticed the defendants of the taking of Mr. Furth's deposition, defendants moved for a protective order to prevent the plaintiff from attending the deposition. Mr. Furth's deposition was taken June 1, 1992. Defendants' motion for a protective order was granted, and pursuant to the Court's Order of that same day, only counsel, Mr. Furth and the court reporter were present. In its January 25, 1993 Order, the Court modified the protective order to allow the parties to examine the transcript from the deposition. The Court further allowed the parties to make general references to the deposition in their dispositive motions. Upon review, the Court finds that Mr. Furth's deposition testimony does not include
(Cont'd)

and testified that the mayor expressed the desire of using the residency requirement to "shut up Zilich"; and ruin him politically. *See* Appendix at 1 and 2. Furth further testified that a number of the defendants had stated that they recognized that plaintiff had not violated the residency requirement, but that it was their intent to use the issue to drive plaintiff out of politics. *See* Appendix at 3.

This evidence also lends itself to the reasonable inference that the legislation was passed with punitive reasons in mind. Finding genuine issues of material fact, the Court denies defendants' motion for summary judgment on plaintiff's bill of attainder claim.

1. *Qualified Immunity.*

Finding that defendants are not entitled to summary judgment on plaintiff's bill of attainder claim, the Court now turns its attention to the defendants' qualified immunity defense. Without much discussion, the defendants argue that they are entitled to qualified immunity.

When individuals wrongfully suffer injuries at the hands of public officials, "action[s] for damages may offer the only

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(Cont'd)
privileged information. As such, the Court vacates its Order and lifts the modified protective order.

In the body of this Memorandum Opinion, when referring to Mr. Furth's deposition, the Court will only provide a summary of Mr. Furth's testimony, but will include a specific reference to the deposition. An accurate recounting of the specific testimony in question will be attached to this Memorandum Opinion as an Appendix.

realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). However, there is a countervailing concern that people will be discouraged from seeking employment in government positions, if, in the exercise of their duties, they can incur substantial personal liability for their actions. *Id.* As a result, courts developed immunity to protect public actors from liability in certain circumstances.

Absolute immunity is generally reserved for government employees performing judicial and legislative functions. *Stump v. Spuekman*, 435 U.S. 349 (1978) (immunity for federal employees); *Tenney v. Brandhove*, 341 U.S. 367 (1951), *reh. den.*, 342 U.S. 843 (1951) (immunity for state employees); and *Haskell v. Washington Township*, 864 F.2d 1266 (6th Cir. 1988) (immunity for municipal employees).[6]

In its June 24, 1992 Memorandum Opinion and Order, the Court held that defendants were not entitled to absolute immunity. The Court denied absolute immunity on the grounds that their conduct in passing and publishing the Resolution and Ordinance was not legislative, but rather was administrative in nature because it was directed at only one individual, plaintiff George Zilich. *Haskell, supra*; and *Cutting v. Muzzey*, 724 F.2d 259, 261 (1st Cir. 1984).

While courts have been unwilling to completely insulate government officials from conduct that is executive or

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6. Although the United States Supreme Court has yet to address the issue, at least eight circuit courts, including the Sixth Circuit, have extended absolute immunity to local legislators for actions taken in their legislative capacity. *Aitchison v. Raffiani*, 708 F.2d 96 (3rd Cir. 1983); and *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982).

administrative, "good faith" or *qualified* immunity is available to shield government employees under certain circumstances.

In evaluating a claim of qualified immunity, the court must determine whether the government actor violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). As a threshold matter, the court must first evaluate whether the plaintiff has asserted a violation of a constitutional right at all. *Siegert v. Gilley*, __ U.S. __, 111 S.Ct. 1789 (1991). Assuming that the plaintiff has stated or proven a constitutional claim, the second part of the qualified immunity analysis requires an inquiry into whether the claim is based on constitutional rights which "were clearly established at the time of the conduct at issue." *Davis v. Scherer*, 468 U.S. 183, 197 (1984). "A right is 'clearly established' when the contours of that right are sufficiently clear that a reasonable [officer] would understand that what he is doing violates that right." *Bettio v. Village of Northfield*, 775 F. Supp. 1545, 1550 (1991), *citing*, *Creighton*, *supra*, at 640. It is the defendants' position that plaintiffs' claim fails under each prong of the qualified immunity test.

On several occasions throughout their various motions, the defendants have noted that under the charter they, as councilmembers, have the right to pass judgment upon the qualifications of their fellow members. Chapter 11 of the Garfield Heights City Council Charter. This right, however, does not give councilmembers the license to deprive an individual of his property without the benefit of trial, nor would a reasonable councilmember believe it to be so. The right to trial, in both criminal and civil actions is a basic fundamental right and is the cornerstone of our justice system. Finding the potential violation

of a clearly established right, the defendants are denied qualified immunity on plaintiff's bill of attainder claim.

E. *First Amendment.*

In his final cause of action, plaintiff claims that in passing the Resolution and Ordinance, the defendants violated his first amendment right to free speech. Plaintiff states that "the Defendants acting under the color of their official positions and under the color of Ordinance 112-1991 and Resolution 54-1991, threatened the Plaintiff and his family, attempted to intimidate him and acted in retaliation against him for his public criticism of the City's administration." Plaintiff's brief in opposition at 12. Plaintiff claims that in addition to adopting and publishing the legislation in question, the defendants caused harassing telephone calls to be placed to his home, windows in his car to be shot out, his home to be vandalized, and his tires to be slashed immediately following a council meeting wherein plaintiff had spoken out against the mayor's proposed budget. It is plaintiff's position that these actions were taken in an effort to punish plaintiff for publicly opposing the Mayor, and prevent him from doing so in the future.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476 (1957). Nowhere is this right to freedom of expression more important than in government, on the national level, state, or local. "The Court has frequently reaffirmed that speech on public issues occupies the 'highest rung on the hierarchy of First Amendment values,' and is entitled to special protection." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

Appendix E

Further, the First Amendment also forbids the imposition of retaliatory sanctions designed to punish the legitimate exercise of First Amendment rights. *Perry v. Sindermann*, 408 U.S. 593 (1971). The prohibition against retaliatory sanctions has been applied to a municipality's retaliation against an individual for his exercise of his first amendment rights. *Hall, supra*; and *Little v. North Miami*, 805 F.2d 962 (11th Cir. 1986).

Defendants contend that "Zilich's argument that the legislation was passed in retaliation for his First Amendment expression is merely his assumption." Defendants reiterate their intent of recovering plaintiff's salary due to his intentional violation of the residency requirement, and their desire to prevent future candidates from violating the requirement as their narrow focus in adopting the legislation.

Further, defendants note that there is no direct evidence linking any of the defendants with the threats and acts of destruction. As for plaintiff's claims that the defendants conspired to "destroy plaintiff's vocation, intimidate him, break his legs, slap him around, cut him, etc.," the defendants point out that there is no evidence of actual efforts to carry out these plans. At best, defendants insist that plaintiff can only establish that certain defendants held several meetings wherein they "spoke of harm coming to Zilich without actually taking action to accomplish it . . ." Defendant's supplemental brief at 9. Defendants also maintain that any conversations directed at harming plaintiff, his family, or his property were made in jest.

As the Court has already observed, the very language of the of the Resolution, the council's decision to publish the Resolution, and the testimony of Tom Furth that several defendants, including certain councilmembers, indicated that

they pursued the residency issue solely to harass plaintiff raise the inference that the legislation was passed to punish the plaintiff. *See* Appendix at 2 and 3. Furth also testified that certain defendants stated that they planned to make harassing phone calls to the plaintiff and his wife, intimidate plaintiff's wife, and bring physical harm to the plaintiff. *See* Appendix at 4. Further, despite the defendants' representation, Furth testified that none of the threats were made in a joking manner. The fact that the defendants admit that they spoke of injuring the plaintiff and destroying his property, along with the fact that plaintiff's property was damaged and he did receive threatening phone calls leads to the reasonable inference that the defendants were responsible. *See* Appendix at 6.

1. *Qualified Immunity.*

As previously emphasized in this Opinion, the First Amendment protects one of our most fundamental constitutional rights, free speech. *Thornhill v. Alabama*, 310 U.S. 88 (1940). The Sixth Circuit has echoed this sentiment. *See Eaton v. Newport*, 975 F.2d 292 (6th Cir. 1992). Certainly, then, the right to express one's opinion free from retaliatory conduct is one that qualifies as a "clearly established right" for purposes of qualified immunity. Because this right is one so cherished in our country, it is fair to conclude that the reasonable person would have recognized that passing legislation aimed at preventing someone from expressing his ideas in a public forum, or punishing an individual for having done so in the past would be a constitutional violation of great magnitude. The Court finds that plaintiff has overcome the defendants' qualified immunity defense on his first amendment claim.

Appendix E

F. *Defamation.*

Plaintiff also brings a defamation claim against the defendants claiming that the "intentional disregard" language contained in the Ordinance and Resolution portrayed him in a negative light.[7] In their motion for summary judgment, the defendants assert that plaintiff's defamation must fail for two reasons: first, plaintiff cannot establish the requisite malicious intent as all of the defendants believed at the time of publication and still believe today that plaintiff violated the residency requirement; and second, plaintiff did violate the residency requirement and the truth is an absolute defense to defamation. *Patio World v. Better Business Bureau, Inc.*, 43 Ohio App. 3d 6 (1989).

Both the plaintiff and the defendants agree that the appropriate test to apply in evaluating the language used in the legislation was first articulated in *New York Times v. Sullivan*, 376 U.S. 254 (1964). In *New York Times v. Sullivan,* the Court held that in order to prevail on a defamation claim, a public Official must demonstrate by clear and convincing evidence that the false

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7. Specifically, the resolution states:

> *SECTION ONE*: The Mayor and this Counsel, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former Councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in remuneration for his service as Councilman because of his being in violation of this provision of the City Charter.

statements were made with "actual malice." The Court held that false statements are made with actual malice if they are made with knowledge of falsity or with reckless disregard for truth or falsity. *Id.*

Ohio courts have also had opportunity to define "actual malice." In *Varanese v. Gall*, 35 Ohio St. 3d 78 (1988), *cert. denied*, 487 U.S. 1206 (1988), the court explained:

> [T]he concept of actual malice in defamation cases involving public officials is separate and distinct from the traditionally defined common-law standard of malice or actual malice. Actual malice in the context of defamation may not be inferred from the evidence of personal spite, ill will, or deliberate intention to injure, as the defendant's motive for publishing are irrelevant. A defamation plaintiff who is required to show actual malice must demonstrate with convincing clarity that the Defendant published a defamatory statement either with actual knowledge that the statement was false, or with a high degree of awareness of its probable falsity.

Id. at 80. *See also Perez v. Scripps-Howard Broadcasting Co.*, 35 Ohio St. 3d 215 (1988), *cert denied*, 488 U.S. 870 (1988).

Defendants maintain that each individual defendant was convinced of the truth of the statements contained in the Resolution and Ordinance, and that each defendant relied on reliable documentary and other physical evidence in arriving at

their conclusion. As a starting point, the defendants note that plaintiff, himself, admitted under oath in 1989 that he purchased a home in Garfield Heights in July, 1987.[8] The purchase of this residence was only two and one half years prior to the election, making plaintiff ineligible to serve on city council.

The defendants also refer to Law Director Mack's letter to plaintiff in which he raised the issue of residency with plaintiff, and invited plaintiff to furnish him with documentation demonstrating that he met the three year requirement, but plaintiff failed to respond. Defendants also cite to several occasions where plaintiff had opportunities to defend his fitness to serve as a councilmember, but failed to do so.[9]

Several councilmembers also received anonymous packets

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8. Plaintiff testified during the course of a trial in which he was a named defendant. Shortly after the election, the incumbent councilmember plaintiff unseated, Corey Rogers, brought suit against plaintiff challenging his qualifications to hold office. The trial court dismissed the action finding that plaintiff was already a councilmember, and that he had not been properly served before he was sworn into office.

9. One such opportunity occurred on March 11, 1991, at a City Council Meeting. Three citizens raised questions about Zilich's residency. According to defendants, plaintiff did not address their questions. Further, defendant Joseph Suster twice asked Zilich the question of whether he had been a resident of Garfield Heights three years prior to the election, on November 8, 1986. Zilich refused to answer Suster's question, but claimed that he had lived in Garfield Heights off and on for over thirty years and that that was longer than some of the people on Council.

At the June 11, 1990 Council Meeting, a citizen, Dan Nichols, asked the Council to conduct an investigation into Zilich's qualifications. The defendants note that "Zilich spoke at length about Nichols' question, but *never* said whether he met the residency requirement. Defendants' brief at 7. (emphasis in original).

of information containing copies of plaintiff's voter registration records and records showing the date on which he took title to his Garfield Heights home. The voting records showed that plaintiff was registered to vote in Bedford Heights in January, 1987 and that he had acquired title to his Garfield Heights home in July, 1987. Again demonstrating that plaintiff had not lived in Garfield Heights for three consecutive years prior to the election in November, 1989.

The defendants claim that based upon the above-mentioned evidence, it was reasonable to believe that plaintiff had intentionally violated the residency requirement. As such, defendants argue that plaintiff cannot demonstrate the necessary actual malice in order to maintain his defamation claim.

However, the Court rules that plaintiff has made a sufficient showing to survive summary judgment on his pendent state action for defamation. First, plaintiff challenges the defendants' position that plaintiff had, indeed, violated the residency requirement. Plaintiff notes that before November 8, 1987, the residency requirement for serving on city council was only one year. In June, 1986 plaintiff moved into his parents home in Garfield Heights with the intent to purchase a home in Garfield Heights. Therefore, plaintiff argues that he was "a resident grandfathered under the one year residency requirement." Plaintiff's brief in opposition at 5. Plaintiff also maintains that because he was living in Garfield Heights in June, 1986 with the intent to stay, he satisfied the three year residency requirement. Without passing on plaintiff's fitness to serve on council, the Court finds that plaintiff has raised genuine issues as to whether he violated the Garfield Heights City Council Charter.

Finding that plaintiff was able to demonstrate factual

disputes as to whether he did, indeed, violate the residency requirement, the Court turns its attention to the issue of whether plaintiff can offer evidence that the statements, if false, were made with actual malice. The feelings of the various defendants toward the plaintiff are irrelevant to this analysis. *Varanese, supra.* What is significant is the information available to the defendants with regards to plaintiff's situation, as well as whether information could have been available to the defendants upon a reasonable investigation.

Plaintiff insists that his testimony in the Corey Rogers trial was not evasive, and that he succinctly and accurately explained his reasons for believing that he had not violated the residency requirement. Plaintiff notes, and several of the defendants admit in their brief, that they read the Rogers transcript and relied on it in forming their collective opinion that plaintiff had violated the Charter. Plaintiff argues that his testimony, alone, would have alerted the councilmembers that there was a question as to whether he really had violated the Charter.

Plaintiff also notes that on April 26, 1990, more than one and one half years before the legislation was passed, defendant Law Director Mack sent a letter to the Cuyahoga County prosecutor's office regarding the issue of plaintiff's compliance with the residency requirement. Plaintiff highlights Assistant County Prosecutor Michael Butler's response letter of May 9, 1990 which included the reference to the retroactive application of the three year residency requirement and included the conclusion that Zilich believed that he had met the residency requirement.

However, plaintiff relies primarily on the testimony of Tom Furth who stated that a number of the defendants continued to pursue the "residency issue" despite the fact that they knew it was

"legally a dead issue." *See* Appendix at 3. Further testified that two law firms were employed by the City to research the issue, but that neither one was able to demonstrate that plaintiff had violated the residency requirement. *See* Appendix at 7. Furth further testified that, despite this evidence, the defendants passed the legislation in order to "ruin plaintiff politically." *See* Appendix at 1 and 2. Plaintiff argues that Furth's testimony establishes that the defendants either knew that plaintiff had not violated the residency requirement, or at least should have suggested to them that the issue need further investigation.

Plaintiff has made a sufficient showing for purposes of summary judgment that the statements contained in the Resolution and Ordinance were false and that such statements were made with knowledge of their falsity or a reckless disregard for their truth or falsity. As such, defendants' motion for summary judgment on plaintiff's defamation claim is denied.

V. CONCLUSION

For the foregoing reasons, defendants' motions for summary judgment on plaintiff's substantive and procedural due process and equal protection claims are granted. Summary judgment is denied on plaintiff's bill of attainder, First Amendment, and defamation claims. Defendants are also denied qualified immunity on plaintiff's bill of attainder and First Amendment claims.

IT IS SO ORDERED.

s/ David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

APPENDIX F — CITY OF GARFIELD HEIGHTS ORDINANCE 112-1991

ORDINANCE NO. *112-1991*

INTRODUCED BY: *Councilwoman Nancy Marincic and Councilman Joseph Suster*

AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE, TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH DURING HIS PREVIOUS TWO YEAR TERM AS COUNCILMAN AT WHICH TIME HE WAS INTENTIONALLY VIOLATING SECTION 9 OF THE CHARTER OF THE CITY OF GARFIELD HEIGHTS.

WHEREAS, Section 9 of the Charter of the City of Garfield Heights reads in pertinent part:

> "Members of Council shall be electors of the City, shall reside in their ward during their term of office, shall have resided in the City continuously for a period of at least three (3) years immediately preceding their election and shall have resided in their respective wards for at least one (1) years preceding their election."; and

WHEREAS, each Councilman has taken an oath to uphold the Charter, and is vested with the obligation of ensuring that the

citizens of the City of Garfield Heights are represented by individuals who meet the qualifications for Council as provided in Section 9 of the Charter of the City of Garfield Heights; and

WHEREAS, it is apparent to this Council that former Councilman George J. Zilich failed to meet the qualifications of Section 9 of the Charter of the City of Garfield Heights during his term as Councilman.

NOW, THEREFORE, BE IT ORDAINED by Council of the City of Garfield Heights, Ohio, that:

SECTION 1. The Law Director be and he is hereby authorized and directed to take whatever legal action is necessary to collect from former Councilman George Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 of the Charter of the City of Garfield Heights.

SECTION 2. The Finance Director be and he is hereby authorized and directed to issue his vouchers of the City for the purpose of effectuating this legislation.

SECTION 3. This Ordinance shall take effect and be in full force from and after the earliest period allowed by law.

PASSED: _____

APPROVED: _____ _____
Mayor President of Council

ATTEST: _____ EFFECTIVE DATE: ____
Clerk of Council

APPENDIX G — CITY OF GARFIELD HEIGHTS RESOLUTION 54-1991

RESOLUTION NO. *54-1991*

INTRODUCED BY: *Councilwoman Nancy Marincic and Councilman Joseph Suster*

A RESOLUTION EXPRESSING THE DISAPPROVAL AND OUTRAGE OF THE COUNCIL OF THE CITY OF GARFIELD HEIGHTS IN REGARD TO THE INTENTIONAL DISREGARD OF SECTION 9 OF THE CHARTER OF THE CITY OF GARFIELD HEIGHTS BY FORMER COUNCILMAN GEORGE ZILICH AND DEMANDING THAT HE RETURN ALL COMPENSATION RECEIVED DURING HIS TENURE AS COUNCILMAN BECAUSE OF HIS INTENTIONAL VIOLATION OF THE CHARTER PROVISIONS OF THIS CITY.

WHEREAS, Section 9 of the Charter of the City of Garfield Heights reads in pertinent part:

> "Members of Council shall be electors of the City, shall reside in their ward during their term of office, shall have resided in the City continuously for a period of at least three (3) years immediately preceding their election and shall have resided in their respective wards for at least one (1) years preceding their election."; and

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WHEREAS, each Councilman has taken an oath to uphold the Charter, and is vested with the obligation of ensuring that the citizens of the City of Garfield Heights are represented by individuals who meet the qualifications for Council as provided in Section 9 of the Charter of the City of Garfield Heights; and

WHEREAS, demand was made upon former Councilman George Zilich by the Director of Law, to substantiate his compliance with Section 9 of the Charter of the City of Garfield Heights because of the existence of attached documents marked Exhibits "A", "B", "C", "D", "E", and "F", and incorporated herein which prove that former Councilman Zilich did not meet the requirements of Section 9 of the Charter; and

WHEREAS, former Councilman George Zilich failed to substantiate his compliance with Section 9 of the Charter of the City of Garfield Heights; and

WHEREAS, it is apparent to this Council that former Councilman George J. Zilich failed to meet the qualifications of Section 9 of the Charter of the City of Garfield Heights.

NOW, THEREFORE, BE IT RESOLVED by Council of the City of Garfield Heights, Ohio, that:

SECTION 1. The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 of the Charter of the City of Garfield Heights by former Councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in renumeration for his service as Councilman because of his being in violation of this provision of the City Charter.

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SECTION 2. The Law Department be and it is hereby authorized and directed to transmit a copy of this Resolution to former Councilman George J. Zilich and to the local news media.

SECTION 3. This Resolution shall be in effect from and after the earliest period allowed by law.

PASSED: _____

APPROVED: _____ _____
Mayor President of Council

ATTEST: _____ EFFECTIVE DATE: ____
Clerk of Council

Appendix G

"EXHIBIT A"

The City of Garfield Heights

555 Turney Road • Garfield Heights, Ohio 44125
Phone 216/475-1100 Fax 216/475-1124

OFFICE OF THE LAW DIRECTOR

June 8, 1990

TO: PRESIDENT OF COUNCIL
ALL MEMBERS OF COUNCIL

FROM: DAVID E. MACK, LAW DIRECTOR

RE: RESIDENCY REQUIREMENT FOR COUNCIL MEMBERS

Dear President of Council and All Members of Council:

Enclosed herein please find the following pursuant to your request:

(1) copies of the letters I have have received from various residents questing the residency of Councilman George Zilich.

(2) A copy of my letter to Councilman Zilich requesting a clarification of this issue.

(3) A copy of my letter to the above mentioned residents outlining my legal opinion on this matter.

Appendix G

As is self-evident from a reading of these documents the power and responsibility for enforcing the Charter provisions referred to in my correspondence rests with this Council and not with the general populace or the administration. If you are in need of any further information, please contact me.

Very truly yours,

s/ David E. Mack J.M.
David E. Mack
Director of Law

DEM/jm
Enclosures: (5)

Appendix G

"EXHIBIT B"

April 4, 1990

Mr. George Zilich
9409 South Highland
Garfield Heights, Ohio 44125

Dear Councilman Zilich:

Please be advised that I have received correspondence relative to your residency status from the following Garfield Heights residents; William P. Monteleone, Betty J. Monteleone, Gloria Turek, Joseph Turek, Cynthia Monteleone, Dan Nichols and Mr. & Mrs. Bryan Mahoney. All of their inquiries relate to your compliance with the provisions of the City Charter that relate to the time you lived in the City prior to the November, 1989 election.

In order to respond to these constituents in a reasonable fashion and assure them, once and for all, that this matter can be put to rest, I am seeking your cooperation. As you have said on many occasions, we should all strive to comply with the Charter of our city. To that end, I am asking that you furnish me with documentation demonstrating that you, in fact, did reside in the City for at least a three (3) year period prior to your election. Those documents may include leases, rent receipts, voting records, mortgage and title transfer documents and most importantly, your RITA tax return. It is my understanding that one must list, with precision, his exact residency for the purpose of completing your tax returns. Since I have no desire to be privy to any other information on your tax return, you may either blank that out or authorize RITA to release only that portion of your return that deals with residency.

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I would like to give these people our answer at the earliest possible time. Therefore, I would ask that you supply me with the above documentation within ten (10) days. Because I have no desire to make this matter public, I would appreciate meeting with you at the Law Department, my downtown office or any other site you deem appropriate, if necessary. I will not bring this up in a council meeting or in any other public forum.

Let's get this behind us once and for all so that you, the rest of Council and the administration can get along with the business of moving the City of Garfield Heights forward.

Very truly yours,

David E. Mack
Law Director

DEM/so

Appendix G

Exhibits C, D, E and F annexed to foregoing resolution are not being printed at this time.

APPENDIX H — CITY OF GARFIELD HEIGHTS CHARTER, SECTIONS 9 AND 11

GARFIELD HEIGHTS CHARTER

SECTION 9. QUALIFICATIONS OF MEMBERS OF THE COUNCIL.

Members of Council shall be electors of the City, shall reside in their ward during their term of office, shall have resided in the City continuously for a period of at least three (3) years immediately preceding their election and shall have resided in their respective wards for at least one (1) year immediately preceding their election. Members of Council shall not hold any other public office or public employment except as otherwise provided in this Charter, and that of Notary Public or member of the State Militia or the Reserve Corps of the United States, and shall not be interested in the profits or emoluments of any contract job, work or service of the Municipality. Any member who shall cease to possess any of the qualifications herein required shall forthwith forfeit his office, and any such contract in which any member is or may become interested may be declared void by the Council. No member of the Council shall, except in so far as is necessary in the performance of the duties of his office, directly or indirectly interfere in the conduct of the administrative department, or directly or indirectly take any part in the appointment, promotion or dismissal of any officer, or employee in the service of the City other than the officers or employees of the Council.

(Amended 11-3-87)

SECTION 11. RULES OF COUNCIL.

The Council shall determine its own rules and keep a journal

of its proceedings. This journal shall at all reasonable times be open to public inspection. The Council shall be the judge of the election and qualifications of its own members. It may expel any member for gross misconduct, or malfeasance in or disqualification for office, or for conviction of a crime involving moral turpitude while in office, or violation of this Charter, or persistent failure to abide by the rules of the Council; provided, however, that such expulsion shall not take place without the concurrence of two-thirds (2/3) of its members nor until the accused members shall have been notified in writing of the charge against him not less than ten (10) days in advance of a public hearing.

APPENDIX I — OHIO REVISED CODE, SEC. 731.44

731.44 Judge of election and qualification of members; quorum and special meetings

The legislative authority of a municipal corporation shall be the judge of the election and qualification of its members. A majority of all the members elected shall be a quorum, but a less number may adjourn from day to day and compel attendance of absent members in such manner and under such penalties as are prescribed by ordinance. The legislative authority shall provide rules for the manner of calling special meetings.

HISTORY: 1953 H 1, eff. 10-1-53
GC 4237

APPENDIX J — OHIO REVISED CODE, SEC. 731.45

731.45 Rules; journal; expulsion of members

The legislative authority of a municipal corporation shall determine its own rules and keep a journal of its proceedings. It may punish or expel any member for disorderly conduct or violation of its rules, and declare his seat vacant for absence without valid excuse, where such absence has continued for two months. No expulsion shall take place without the concurrence of two thirds of all the members elected, and until the delinquent member has been notified of the charge against him and has had an opportunity to be heard.

HISTORY: 1953 H 1, eff. 10-1-53
GC 4238

APPENDIX K — CITY OF GARFIELD HEIGHTS CODE SEC. 525.02(a)(3)(4)

525.02 FALSIFICATION.

(a) No person shall knowingly make a false statement, or knowingly swear or affirm the truth of a false statement previously made, when any of the following apply:

(1) The statement is made in any official proceeding.

(2) The statement is made with purpose to incriminate another.

(3) The statement is made with purpose to mislead a public official in performing his official function.

(4) The statement is made with purpose to secure the payment of worker's compensation, unemployment compensation, aid for the aged, aid for the blind, aid for the permanently and totally disabled, aid to dependent children, general relief, retirement benefits or other benefits administered by a governmental agency or paid out of a public treasury.

(5) The statement is made with purpose to secure the issuance by a governmental agency of a license, permit, authorization, certificate, registration or release.

(6) The statement is sworn or affirmed before a notary public or other person empowered to administer oaths.

(7) The statement is in writing on or in connection with a report or return which is required or authorized by law.

(8) The statement is in writing, and is made with purpose to induce another to extend credit to or employ the offender, or to confer any degree, diploma, certificate of attainment, award of excellence or honor on the offender, or to extend to or bestow upon the offender any other valuable benefit or distinction, when the person to whom such statement is directed relies upon it to his detriment.

(9) The statement is made with purpose to commit or facilitate the commission of a theft offense involving the proceeds of an insurance policy.

(b) It is no defense to a charge under subsection (a)(4) hereof that the oath or affirmation was administered or taken in an irregular manner.

(c) Where contradictory statements relating to the same fact are made by the offender within the period of the statute of limitations for falsification, it is not necessary for the prosecution to prove which statement was false but only that one or the other was false.

(d) Whoever violates any provision of subsection (a)(1) to (8) hereof is guilty of falsification, a misdemeanor of the first degree. Whoever violates subsection (a)(9) hereof is guilty of falsification of an insurance claim, a misdemeanor of the first degree if the amount of the claim is less than three hundred

dollars ($300.00), if the offender has not previously been convicted of a theft offense and if the claim is not made for the theft of a motor vehicle. (ORC 2921.13)

APPENDIX L — DECEMBER 22, 1992 CORRESPONDENCE TO GEORGE ZILICH FROM SCOTTSDALE INSURANCE COMPANY

SCOTTSDALE INSURANCE COMPANY®

December 22, 1992

Patrick M. Flanagan
Attorney at Law
596 West Broad Street
Elyria, OH 44035

RE:	Claim No.: 200453-71
Insured:	City of Garfield Heights
Policy Nos:	PES 000101 and PO 320563 (policy period 4/1/92 to 4/1/93)
Claimant:	George Zilich

Dear Mr. Flanagan:

This is to acknowledge receipt of the notice of claim and the counterclaim in the above matter involving George Zilich vs. City of Garfield Heights, which was forwarded through your office.

This is a counterclaim for damages involving fraud, violation of statute, wages and unjust enrichment, and a claim arising from the complaint of a local regulatory agency.

In view of the fact that this is not a claim for bodily injury, property damage or personal injury, there is no coverage under the public entity policy number PES 000101.

Please be formally advised that my review of your public official policy number PO 320563 (policy period 4/1/92 to 4/1/93),

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indicates that it contains four exclusions which apply to the claim herein. I specifically call your attention to the following:

EXCLUSIONS

The Company shall not be obligated to make any payment nor defend any lawsuit in connection with any claim made against the INSURED:

1. Based upon or attributable to the INSURED gaining any profit, advantage or remuneration to which the INSURED is not entitled;

2. Brought about or contributed to by fraud, dishonesty or bad faith by an INSURED or arising from the deliberate violation of any federal, state, or local statute, ordinance, rule or regulation committed by or with the knowledge and consent of the INSURED:

12. For any loss, cost, civil fine, penalty or expense against any INSURED arising from any complaint or enforcement action from any federal, state or local governmental regulatory agency;

13. For back wages, overtime or similar claims, even if designated as liquidated damages, under any federal, state or local statutes, rules, ordinances or regulations,

or claims arising from collective bargaining agreements;

Because this is a claim for damages involving fraud, violation of statute, wages and unjust enrichment, and involves a claim arising from the complaint of a local regulatory agency, it is excluded from coverage under the above provisions of the policy.

Please also be advised that the actual claim herein occurred on November 13, 1989. I am attaching a copy of the prior acts endorsement on policy PO 320563, which excludes wrongful act (S) committed or alleged to have been committed prior to 4/1/90. Because this alleged wrongful act was committed prior to 4/1/90, it is excluded from coverage under the above provision of the policy.

Please also be advised that my review of your public official policy number PO 320563, indicates that it contains the definition of the *INSURED*. I specifically call your attention to the following:

DEFINITIONS

Whenever used in this policy, the following words have these meanings:

INSURED—Means:

2. All persons who were, now are, or shall be lawfully elected, appointed or employed officials of the public entity.

Because the claimant, George Zilich, and a counterclaim

Appendix L

defendant was not a lawfully elected official, he is excluded from coverage under the above provision of the policy.

In these circumstances, at this time, Scottsdale Insurance Company respectfully disclaims coverage for this matter. We will not participate in the defense or indemnification for this claim.

We reserve the right to review any additional lawsuits or amendments to this lawsuit to make a separate determination as to whether either a defense, or indemnity, might be provided by the company. It is possible that we might provide a defense and/or indemnity on a new or amended complaint. Our decision on coverage is based only on the facts as presented to us to date and should not be construed as applicable to a new suit or an amendment to this suit. Our right to have notice of either situation is reserved, as are the notice conditions of the policy.

Should you have any information that is contrary to that expressed above, or if you have any questions, comments or objections, please contact the undersigned.

Sincerely,

s/ Jim Silver/for DD
Dick Dobis
Sr. claims Examiner

Attachment

cc: Leo Warden Associates
Dallas Building
2217 E. 9th Street
Cleveland, OH 44115

Appendix L

Mayor
City of Garfield Heights
555 Turney Road
Garfield Heights, OH 44125

David Mach
Law Director
City of Garfield Heights
5407 Turney Road
Garfield Heights, OH 44125

Love Insurance Agency, Inc.
27900 Euclid Avenue
Cleveland, OH 44132

AON/Governmental Programs

DD/jm
P8/304

Supreme Court, U.S.
FILED
MAR 2 1995

No. 94-1313

In The

Supreme Court of the United States

October Term, 1994

GEORGE ZILICH,

Petitioner,

vs.

THOMAS J. LONGO, DAVID E. MACK, NANCY J. MARINCIC, ROSE MARIE LOVANO, JOSEPH SUSTER, MICHAEL ABELLA, and WILHELM G. SPIEGELBERG, In Their Individual Capacities,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED (PER PETITIONER)

1. Is a City Ordinance a Bill of Attainder proscribed by Article I, Section 10 of the United States Constitution where that Ordinance enacts into law the opinion of the City Council that a former councilman intentionally violated the City's Charter and authorizes the City's law director to take whatever action is necessary – legal or otherwise – to recoup the councilman's pay?

2. Does a City Ordinance enacted against a former councilman for speaking out on matters of public concern violate, under color of law, the councilman's right of freedom of speech protected by the First Amendment of the United States Constitution?

LIST OF PARTIES

All parties in the Sixth Circuit Court of Appeals proceeding are listed in the above caption.

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TO THE HONORABLE SUPREME COURT:

Respondents Thomas Longo, David E. Mack, Nancy J. Marincic, Rose Marie Lovano, Joseph Suster, Michael Abella, and Wilhelm G. Spiegelberg, in their individual capacities, respectfully request that this Court deny the Petition for Writ of Certiorari submitted by the petitioner, George Zilich.

REPORTS OF OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Petitioner's App. "C", 5a) is reported at 34 F.3d 359. The memorandum opinion and judgment entry of the United States District Court for the Northern District of Ohio (Petitioner's App. "E", 24a), which denied respondents' qualified immunity motion for summary judgment, is not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on September 1, 1994. The Sixth Circuit denied respondents' Petition for Rehearing and Suggestion for Rehearing En Banc in an order filed November 3, 1994. Respondents question whether the Supreme Court has jurisdiction to grant petitioner's Petition for Writ of Certiorari since respondents' appeal to the Sixth Circuit Court of Appeals was an interlocutory appeal based on the District Court's denial of respondents' motion for summary judgment on the ground of

qualified immunity. It is submitted that the proper time for petitioner's appeal is after a final order by the District Court disposing of all issues in the case, as distinguished from the decision of the Sixth Circuit Court of Appeals affirming the denial of qualified immunity as to one claim and reversing the denial of qualified immunity with regard to two other claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 10 of the United States Constitution provides in pertinent part: "No State shall . . . pass any bill of attainder. . . . "

The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech. . . . "

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law;. . . . "

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Rule 56(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that summary judgment shall be rendered "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(e) provides, in pertinent part, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, . . . the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Garfield Heights Ordinance No. 112-1991 is set forth in petitioner's Appendix "F" (49a-50a). The excerpt on pages 2-3 of petitioner's Petition for Writ of Certiorari is incomplete and misleading: it quotes only the title of the ordinance.

Garfield Heights Resolution No. 54-1991 is set forth in petitioner's Appendix "G" (51a-58a), except that petitioner does not set forth Exhibits C, D, and F to said resolution. Although Exhibits C, D, and E are not necessary for the determination of the subject Petition for Writ of Certiorari, respondents reserve the right to refer to and reproduce same should the Court grant the subject Petition for Writ of Certiorari.

Relevant portions of the Ohio Revised Code, the Charter of the City of Garfield Heights, and the Codified Ordinances of the City of Garfield Heights are set forth on pages 59a-65a of the subject Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner filed this action in the United States District Court for the Northern District of Ohio, Eastern Division. Petitioner alleged, *inter alia*, that respondents violated petitioner's rights under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Jurisdiction was therefore conferred on the District Court by 28 U.S.C. §§ 1331 and 1343.

Respondent Thomas J. Longo ("Longo") has been at all pertinent times the Mayor of the City of Garfield Heights ("Garfield Heights"). Respondent David E. Mack ("Mack") has been at all pertinent times the Director of Law of Garfield Heights. Respondent Wilhelm G. Spiegelberg ("Spiegelberg") was an Assistant Law Director of Garfield Heights. The other respondents are members of the Garfield Heights City Council ("Council"). Petitioner sued respondents in both their individual and official capacities; the petitioner also named Garfield Heights as a defendant.

Respondents filed a motion for summary judgment on the basis of qualified immunity with regard to the individual capacity claims against them. The District Court denied that motion with respect to three of petitioner's federal claims: (1) a claim invoking Article I, § 10 of the Constitution ("No State shall . . . pass any bill of attainder") as applied to a resolution and ordinance passed by the Council on November 11, 1991; (2) a First Amendment claim (applied to local governmental action by the Fourteenth Amendment) based on the November 11, 1991 resolution and ordinance; and (3) a First/Fourteenth Amendment claim based on alleged harassment of

petitioner prior to his leaving office as a Council member on November 10, 1991. In an interlocutory qualified immunity appeal, the Sixth Circuit Court of Appeals reversed the denial of qualified immunity with regard to the first two claims; however, the Sixth Circuit affirmed the denial of qualified immunity with regard to the First Amendment claim predicated upon alleged pre-November 11, 1991 threats or acts of physical violence.

In a Petition for Writ of Certiorari filed January 31, 1995 (Supreme Court Case No. 94-1297), respondents seek Supreme Court review of the Sixth Circuit's denial of qualified immunity with regard to the First Amendment claim predicated upon alleged pre-November 11, 1991 threats or acts of physical violence. Petitioner's Petition for Writ of Certiorari, filed February 1, 1995 (first received by respondents' counsel on February 2, 1995) in the present case (Supreme Court Case No. 94-1313) seeks Supreme Court review of the Sixth Circuit's reversal, in an interlocutory qualified immunity appeal, of the District Court's denial of qualified immunity on the Bill of Attainder claim and on the First Amendment claim based on the November 11, 1991 resolution and ordinance. As explained above, respondents question whether the Supreme Court has jurisdiction to grant a Petition for Writ of Certiorari filed by a plaintiff appealing a circuit court of appeals decision in an interlocutory qualified immunity appeal.

Petitioner was a member of the Garfield Heights Council from November 13, 1989 to November 10, 1991. Before, during, and after petitioner's term on the Council, various people inside and outside the government of Garfield Heights questioned whether petitioner had met

the residency requirement of the Garfield Heights Charter applicable to members of Council. On November 11, 1991 – the day after petitioner left office – the newly constituted Council adopted Resolution No. 54-1991, which provided, in pertinent part, as follows:

> The Mayor and this Council, on behalf of the residents of the City of Garfield Heights, join together to express their disapproval and outrage over the intentional disregard of Section 9 [residency requirement] of the Charter of the City of Garfield Heights by former Councilman George Zilich during his tenure as Councilman, and demand that he return all compensation given to him in renumeration [*sic*] for his service as Councilman because of his being in violation of this provision of the City Charter.

At the same November 11, 1991 meeting, the Council also passed Ordinance No. 112-1991, which provided, in pertinent part, as follows:

> The Law Director . . . is hereby authorized and directed to take whatever legal action is necessary to collect from former Councilman Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 [residency requirement] of the Charter of the City of Garfield Heights.

The title of this ordinance read, in pertinent part: "AN ORDINANCE AUTHORIZING AND DIRECTING THE DIRECTOR OF LAW TO TAKE WHATEVER ACTION IS NECESSARY, LEGAL OR OTHERWISE, TO COLLECT THE SALARY RECEIVED BY FORMER COUNCILMAN GEORGE ZILICH. . . . "

Petitioner testified in his deposition that at the end of March 1990, after Council had voted down the Mayor's budget, petitioner scheduled a special meeting of the Council Finance Committee for a particular evening. Earlier on the day of the meeting, someone called petitioner and stated over the telephone: "You're a dead man, asshole. I'll see you tonight." Petitioner does not know the identity of the caller. The Finance Committee meeting was, in petitioner's words, "filled with City employees. Virtually everybody there was a City employee. They were there under the pretence that I was out to eliminate their jobs, and they were ready to kill me." However, nobody ever physically attacked petitioner.

Petitioner also testified that his wife received threatening and menacing telephone calls when he was out of town. However, petitioner's wife did not testify, and this testimony is therefore inadmissible hearsay.

Petitioner testified further that periodically during 1990 his home was vandalized, that in November 1990 his car windows were shot out, and that his car tires were slashed. He said that when he filed a police report regarding the car window incident, an unidentified police officer said these types of things would stop if petitioner would merely stop the criticisms and allegations against the Mayor and the Law Department. Petitioner's testimony regarding the alleged statement by the police officer – which does not meet the requirements of Fed. R. Evid. 801(d)(2) – constitutes inadmissible hearsay. Moreover, the alleged statement of the police officer is, in the absence of an evidentiary foundation establishing otherwise, inherently unreliable as being inadmissible speculation or gossip. The only possible evidentiary foundation

that would make the statement admissible would be testimony based on personal knowledge that the police officer was directed or authorized by one or more of the respondents to make this statement to petitioner. No such evidence exists.

Petitioner also testified that he had alienated landfill operators and trash haulers and that he was warned by several people to back off because he was dealing with the wrong people when he got involved with landfill operators and trash haulers. However, no such persons have been sued by petitioner.

The foregoing summarizes petitioner's testimony regarding evidence of alleged threats or acts of physical violence against petitioner. No evidence exists that the harassers somehow revealed their supposed connection with the government of Garfield Heights. The legal significance of the anonymous nature of the alleged harassment is discussed on pages 8-14 of the Petition for Writ of Certiorari filed by respondents on January 31, 1995 (Supreme Court Case No. 94-1297); respondents establish therein that such anonymous acts do not satisfy the "under color of" state law requirement of 42 U.S.C. § 1983.

Petitioner also relies on the deposition of Thomas Furth ("Furth"), a former Assistant Law Director of Garfield Heights. Furth testified as to meetings with respondents Longo, Mack, and/or Spiegelberg in which such scenarios as raping petitioner's wife, cutting petitioner (a reputed hemophiliac) with a knife, breaking petitioner's legs, and otherwise physically injuring petitioner were allegedly discussed. However, it is undisputed that no

such acts of physical violence against petitioner or his wife ever occurred, and no evidence exists that any of the respondents ever threatened petitioner with any such acts of physical violence.

Several factual assertions in petitioner's Petition for Writ of Certiorari lack a significantly probative evidentiary basis. For example, the allegation on page 3 of the subject Petition for Writ of Certiorari that "[t]his terror campaign was authorized by the City's Mayor, Law Director, Assistant Law Director and members of Council" is not supported by significantly probative evidence. Similarly, the conclusory statements on page 8 are unsupported by specific evidence or are otherwise misleading. Thomas Furth testified, in exceedingly general terms, that respondents Spiegelberg, Mack, and Long "indicated" to Furth "that they were carrying out their plans to deal with and intimidate George Zilich. . . . " However, Furth testified that "I don't want to say that they used the term physical harm. . . . " Furth's testimony on this matter is too vague and indefinite to constitute significantly probative evidence sufficient to defeat summary judgment. (See the discussion on pages 14-19 of the Petition for Writ of Certiorari filed by respondents on January 31, 1995 (Supreme Court Case No. 94-1297), which is incorporated herein by reference.) Furthermore, no evidence exists in the record to support the assertion on page 3 of petitioner's Petition for Writ of Certiorari that "[t]his terror campaign was authorized by . . . members of council", i.e., respondents Marincic, Lovano, Suster, and Abella.

Petitioner also asserts that the language "legal or otherwise" in the title to Ordinance No. 112-1991 meant that "[t]he campaign to destroy Petitioner personally and

politically carried the full force and effect of the law in the City of Garfield Heights. The threat to his person, property and possessions is now a matter of law." Petition for Writ of Certiorari at 4. Similarly, petitioner later alleges that the language "legal or otherwise" in the ordinance "is a clear indication that this was nothing more than another threat letting the Petitioner know that the same people who authored the prior threats and physical violence were behind this Ordinance." *Id.* at 18. However, the construction by petitioner of the phrase "legal or otherwise" in the *title* of the ordinance is totally speculative and unreasonable, especially considering the context of the ordinance. The operative part of the ordinance, which contained no "legal or otherwise" language, merely provided:

> NOW, THEREFORE, BE IT ORDAINED by Council of the City of Garfield Heights, Ohio, that:
>
> SECTION 1. The Law Director be and he is hereby authorized and directed to take whatever *legal action* is necessary to collect from former Councilman George Zilich the salary he received during his term as Councilman because of former Councilman Zilich's intentional disregard and violation of Section 9 of the Charter of the City of Garfield Heights.

Petitioner's App. "F" at 50a (emphasis added). As the Sixth Circuit Court of Appeals observed in its September 1, 1994 opinion, "the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport to confiscate or

take title to any of Zilich's property." Petitioner's App. "C" at 10a.

ARGUMENT

I. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE ORDINANCE WAS NOT A BILL OF ATTAINDER.

The Sixth Circuit Court of Appeals correctly held that Ordinance No. 112-1991 did not constitute a Bill of Attainder within the meaning of Article I, § 10 of the United States Constitution, and the discussion of the Sixth Circuit regarding this issue (Petitioner's App. "C" at 9a-12a) is incorporated herein by reference. As the Sixth Circuit observed, *"the city council merely passed an ordinance authorizing the law director to go to court in order to recover amounts it considers illegally received by the plaintiff. The ordinance does not purport to confiscate or take title to any of Zilich's property."* Petitioner's App. "C" at 10a (emphasis added). Nevertheless, without citing any evidence of record in the present case, petitioner conjures up the following parade of horribles on page 14 of his Petition for Writ of Certiorari: "Property can be subject to liens or attachment or wages garnished merely because the legislature determines that the former legislator held office illegally. The protections of notice, hearing, and judicial trial will not be afforded." Whatever scenario petitioner is imagining, it is certainly not the fact situation of petitioner's own case.

The Court of Appeals also observed that "Plaintiff has not cited, and our research has not disclosed, a single

case in which a court has held that judging a member's qualifications constitutes a bill of attainder." Petitioner's App. "C" at 11a. "[J]udging a member's qualifications is a legislative function, not a judicial one." *Id.* at 12a. As to petitioner's argument that the Council's action occurred after petitioner left Council, the Sixth Circuit properly observed:

> Finally, the fact that the city council's action came after the plaintiff was no longer a member does not matter. A state court may decide that the city council exceeded its power under state law precisely because plaintiff was a former member. This is a matter more properly to be determined under state law. *The city council may authorize its city attorney to initiate a lawsuit against a former member of that body. It is not a proper role for federal courts to determine these local political matters under the Bill of Attainder Clause.*

Id. at 12a (emphasis added). The foregoing is the appropriate response to petitioner's request that the Supreme Court "correct [the Sixth Circuit's] misconstruction" of the Ohio Revised Code and the Charter of the City of Garfield Heights.

In discussing the Bill of Attainder issue, petitioner emphasizes the separation of powers concepts in the United States Constitution, quoting *United States v. Brown*, 381 U.S. 437 (1965). Petition for Writ of Certiorari at 15. However, *Brown* involved the Bill of Attainder Clause applicable to Congress (Art. I, § 9, cl. 3, United States Constitution), *not* the Bill of Attainder Clause applicable to the states (Art. I, § 10, United States Constitution). This distinction is important when considering the separation of powers analysis in *Brown*, which

involved an Act of Congress and referred specifically to the United States Constitution's division of "the National Government into three branches – Legislative, Executive and Judicial." 381 U.S. at 442-43. This Court has repeatedly held that the separation of powers concepts applicable to the federal government cannot be enforced by federal courts against states and their political subdivisions. "[T]he doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. United States*, 445 U.S. 684, 689 n.4 (1980). In *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937), the Court held as follows:

> The Constitution of the United States in the circumstances here exhibited has no voice on the subject. The statute challenged as invalid is one adopted by a state. This removes objections that might be worthy of consideration if we were dealing with an Act of Congress. *How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.* Nothing in the distribution here attempted supplies the basis for an exception.

(Emphasis added.)

Moreover, even if petitioner's underlying Bill of Attainder claim is deemed to be valid, the respondents were entitled to summary judgment on the basis of qualified immunity because there is no clearly established law which would have lead a reasonable public official to know that the passage of the legislation was unlawful. "The doctrine of qualified immunity shields public officials . . . from damages unless their conduct was unreasonable in light of clearly established law." *Elder v.*

Holloway, 510 U.S. ___, 114 S.Ct. 1019, 1021, 127 L.Ed.2d 344, 349 (1994); *accord Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). More specifically, "*[a] plaintiff* who seeks damages for violation of *constitutional* or statutory rights may overcome the defendant official's qualified immunity only by *showing* that *those rights* were *clearly established at the time of the conduct at issue.*" *Davis v. Scherer*, 468 U.S. 183, 197 (1984) (emphasis added). Clearly established law exists only where prior case law has held that a similar official action has been held unlawful under the same legal theory being presented by the plaintiff in the present case. *Lundblad v. Celeste*, 924 F.2d 627, 628 (6th Cir. 1991) (*en banc*). There are no decisions by either the Supreme Court or the Sixth Circuit which find a legislative enactment unlawful under a Bill of Attainder analysis in any situation remotely resembling this case. In fact, there are very few cases anywhere addressing the Bill of Attainder Clause contained in Art. I, § 10 of the Constitution. One law review article notes that:

> The Supreme Court has relied on the bill of attainder clause to strike down legislative actions only four times in almost two hundred years. Academic commentary on the clause understandably has been somewhat sparse. Inattention on the part of judges and scholars has in turn led to clumsy doctrinal development, with the Court unable to supply clear principles which both explain past decisions and offer a sensible guide to future results.

Note, *Beyond Process: A Substantive Rationale for the Bill of Attainder Clause*, 70 Va. L. Rev. 475, 475 (1984).[1] There is a complete lack of legal precedent which would have lead a reasonable public official to the conclusion that passage of legislation judging the qualifications of a council member could constitute a Bill of Attainder.

Accordingly, this Court should not grant the subject Petition for Writ of Certiorari with regard to petitioner's Bill of Attainder claim. As discussed above, it is doubtful whether the Supreme Court has jurisdiction to grant the petitioner's Petition for Writ of Certiorari since the procedural posture of the case is that of a qualified immunity interlocutory appeal, and petitioner is the plaintiff, not an individual capacity defendant, in this action. Even apart from jurisdictional issues, however, this is not a proper case for determining the applicability of Article I, § 10 of the United States Constitution. The fact situation in the present case does not even remotely trigger the Bill of Attainder Clause. Moreover, the dearth of controlling case law on the Clause would necessarily result in the

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[1] None of those four cases has any similarity to this case. *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1866), invalidated the post-civil war practice of requiring attorneys to take loyalty oaths as a condition of retaining a license. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1866), invalidated a similar oath required of priests and ministers. *United States v. Lovett*, 328 U.S. 303 (1946), invalidated a Congressional enactment that three specified individuals then working for the U.S. government were barred from receiving any salary from the United States, a law which was passed as a result of the three individuals' allegedly subversive activities. *United States v. Brown*, 381 U.S. 437 (1965), invalidated a law which made it a crime for a member of the Communist Party to serve as a union officer or employee.

Court finding that respondents were entitled to qualified immunity with regard to petitioner's Bill of Attainder claim.

II. THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE ORDINANCE AND RESOLUTION DID NOT VIOLATE PETITIONER'S FIRST AMENDMENT RIGHT TO FREEDOM OF SPEECH.

As the Sixth Circuit Court of Appeals observed in its September 1, 1994 opinion, "[t]he First Amendment is not an instrument designed to outlaw partisan voting or petty political bickering through the adoption of legislative resolutions." Petitioner's App. "C" at 13a. Moreover, "[t]he ordinance merely authorizes the law director to file a lawsuit against plaintiff. . . . [T]he ordinance contains no punishment or penalty. We therefore do not consider these two hortatory measures to violate plaintiff's First Amendment rights." *Id.* at 14a.

The excellent discussion of the Sixth Circuit Court of Appeals regarding this claim (Petitioner's App. "C" at 12a-14a) is incorporated herein by reference. Again, petitioner's conjurations that the Sixth Circuit's holding "exposes [the] property [of former legislators] to attack" (Petition for Writ of Certiorari at 18) are nothing but mere speculation not based on any evidence of record in this case. The fictional case petitioner invokes is not this case.

In addition, as discussed above, this Court may not have jurisdiction to grant the subject Petition for Writ of Certiorari since the procedural posture of this case is that

of a qualified immunity interlocutory appeal, and petitioner is the plaintiff, not an individual capacity defendant. Moreover, petitioner does not even attempt to establish that respondents are not entitled to qualified immunity as to this claim; the term qualified immunity is conspicuously absent from petitioner's discussion. Accordingly, it would not be appropriate for this Court to review the applicability of the First Amendment to Ordinance No. 112-1991 and/or Resolution No. 54-1991 of the City of Garfield Heights.

CONCLUSION

On the basis of the foregoing arguments and authorities, respondents respectfully request that the Court deny the Petition for Writ of Certiorari submitted by petitioner.

Respectfully submitted,

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